IN THE SUPREME COURT OF MISSOURI
EN BANC

IN RE: DAN J. KAZANAS MO Bar #31056 Respondent.	Supreme Court No. SC83033

RESPONDENT DAN J. KAZANAS' BRIEF

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Article V, Section 5 of the Missouri Constitution, Missouri Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo. (1994), establishes jurisdiction over Respondent Dan J. Kazanas in this disciplinary proceeding.

CHRONOLOGICAL OF EVENTS

A brief history of chronological events is as follows:

a) On September 14, 2000, Informant filed its Information requesting an Order to show cause as to why Respondent should not be disciplined.

b) On October 2, 2000, Respondent filed his Answer and Response to Informant's Information consenting to an immediate order suspending him from the practice of law.

c) On October 16, 2000, this Court suspended Respondent from the practice of law in this state, and ordered Respondent to show cause why an order of disbarment should not issue.

d) On October 30, 2000, Respondent filed his Response to Order to Show Cause.

e) On November 7, 2000, Informant filed its Reply to Respondent Response to Order to Show Cause.

f) On December 5, 2000, this Court ordered Informant and Respondent to brief this case.

g) On January 5, 2001, Informant filed its Brief for the order of 12/5/00.

h) On January 18, 2001, Respondent filed his Application for Voluntary Surrender of License Pursuant To Rule 5.25.

i) On January 24, 2001, Respondent filed his Brief for the order of 12/5/00.

j) On February 26, 2001, Informant filed its Report and Recommendation regarding Respondent's Application for Voluntary Surrender of License.

k) On February 28, 2001, this Court entered the following order: "Respondent's application for voluntary surrender denied."

l) On March 7, 2001, this Court held Oral Arguments regarding Informant's Information against Respondent.

m) On March 8, 2001, this Court ordered the appointment of the Honorable McCormick V. Wilson as Master regarding Informant's Information against Respondent. In part, this Court directed that the Master "inquire into issues touching on appropriate discipline, including the source of income that Respondent failed to report on his income taxes for the years in question." This Court also directed the Master to file his findings of fact, particularly with respect to the source of income upon which taxes were not paid by Respondent, together with his other findings of fact, conclusions of law and recommendation as to discipline.

n) On January 14 and 15, 2002, a hearing was held in this case before the Master.

o) On April 17, 2002, the Master filed his Report.

p) On May 17, 2002, Respondent filed his Exceptions to Master's Report.

q) On May 23, 2002, Respondent filed his Request for Hearing pursuant to Rule 68.03 (g) and (h).

r) On June 25, 2002, this Court entered the following order: "Respondent's request for hearing sustained. Briefing schedule is activated on this date pursuant to Rule 84.24 (i)."

s) On July 27, 2002, Informant filed its Brief for the order of 6/25/02.

STATEMENT OF FACTS[1]

a) Introduction.

Respondent Dan J. Kazanas, as a shareholder lawyer, had a financial dispute with the law firm of Klutho, Cody & Kilo, P.C. ("KCK") as to who was entitled to fees collected from "his" cases or "his" clients for legal services rendered by Respondent (i.e. not involving "client funds"). Informant conceded in this case, "We don't have any evidence that any clients are out any money" [**Tr. I at 49, lines 21 and 22**]. Respondent states he was entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to fee-division arrangement between KCK and Respondent,

[1] The facts contained herein are drawn from the Stipulation of Facts, with exhibits, admitted into evidence as Master's Exhibit "1" as well as the testimony elicited and the exhibits admitted into evidence at the Hearing in this case conducted on January 14 and 15, 2002. Reference to the Stipulation of Facts between the parties is denoted by "Stipulation" followed by the appropriate paragraph number. "Stipulation Exhibit" followed by the relevant exhibit number denotes references to the Stipulation Exhibits. Referenced to the Hearing testimony on January 14, 2002 are denoted by "Tr. I at ___, line(s) ___" followed by the appropriate page and line reference. Referenced to the Hearing testimony on January 15, 2002 are denoted by "Tr. II at ___, line(s) ___" followed by the appropriate page and line reference. References to Hearing exhibits are denoted by the name of the offering party followed by the appropriate exhibit number.

negotiated in mid January 1994 between Respondent and John Kilo, the President and managing partner of KCK ("fee-division arrangement"). KCK alleges that Respondent misappropriated checks from KCK.

Respondent admitted he violated Title 26, United States Code, Section 7206(1), by underreporting his 1996 income on Schedule "C" (income from a sole proprietorship) because of the his reckless disregard of a known legal duty in which he calculated and reported to the taxing authorities his portion of his thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to fee-division arrangement.

Informant has recommended in its Information to Show Cause and Motion for Discipline dated September 14, 2000 that this Court disbar Respondent for failing to voluntarily surrender his law license, for violating Section 7206(1), and presumably for misappropriation of checks from KCK. Respondent shall address these issues in reverse order in this Brief after first providing to this Court a complete and accurate statement of facts relevant to this disciplinary action.

b) <u>Respondent's Professional Background</u>.

Respondent, born February 17, 1959, graduated in May 1983 from St. Louis University with a Jurist Doctor degree (JD). In September 1983, he became licensed to practice law in the State of Missouri [**Tr. 11, at 142, lines 6-24**]. Respondent has never before received a complaint or been the subject of a disciplinary proceeding as a lawyer, other than the situation that gave rise to this case [**Tr. 11, at 142, line 25, at 143, lines 1-3**]. Respondent has never been fired from a job, has never been unemployed for a

significant period of time, has never taken bankruptcy, has never been divorced, and has never sought treatment or been treated for alcohol or substance abuse [**Tr. 11, at 143, lines 4-25, at 144, lines 1-10**].

c) Respondent's association with Klutho, Cody & Kilo, P.C. ("KCK").

Respondent was employed as an associate lawyer from November 1983 until January 1994, and as a shareholder lawyer (or sometimes referred to as a "partner") from January 1994 until January 15, 1997 with KCK.

In the first four (4) to five (5) years at KCK, Respondent reported directly to John Kilo, the President and managing partner of KCK [**See Para. 1 of Respondent's Exhibit "VV"**] and provided a significant amount of legal services to John Kilo's clients [**Tr. I, at 109, lines 3-4, Tr. 11, at 145, lines 21-25, at 146, lines 16-18**]. As time passed, Respondent developed his own significant clientele base [**Tr. II, at 146, lines 19-25, at 147, lines 1-7**]. Respondent, in anticipation of becoming a partner at KCK, worked very hard and many hours per week as demanded by John Kilo and the other then partners at KCK [**Tr. II, at 148, lines 6-25, at 149, lines 1-14**]. The quality and quantity standards of Respondent's legal services rendered and his work ethic, and ability to bring new clients into KCK, met the standards set by the executive committee at KCK [**Tr.192, at 2-18**].

During the first ten (10) years—1983 to 1993—while Respondent was an associate lawyer at KCK, KCK received all of the fees collected from Respondent's cases or from "his" clients [**Tr. II, at 147, lines 8-25, at 148, lines 1-5; see also Master's Report at para. 3, page 3**].

d) <u>Fee-division arrangement between KCK and Respondent</u>.

In early January 1994, Respondent orally informed John Kilo, the President and managing partner of KCK, that he was resigning from KCK and starting his own law firm [**Tr. II, at 155, lines 10-16**]. Thereafter, Respondent finalized his arrangement with his new law partner at his new law firm. During the transition period between leaving KCK and commencing at his new law firm, Respondent offered Margaret Grinstead, who was then employed at KCK as a legal secretary, to join Respondent in his new law firm. Margaret Grinstead accepted the offer from Respondent [**Tr. II at 154, lines 4-25, at 155, lines 1-8, at 156, lines 10-25, at 157, lines 1-3**].

In mid January 1994, John Kilo requested a meeting with Respondent in order to determine what KCK needed to do to keep Respondent from leaving KCK [**Tr. II at 157, lines 4-17, at 158, lines 13-22**]. Respondent met with John Kilo [**Tr. I, at 114, lines 6-10**]. The night before the meeting, Respondent set forth the conditions in writing on an envelope [**Respondent's Exhibit "C-1"**] that KCK needed to meet before he would consider staying at KCK, which included the fee-division arrangement. Respondent provided a copy of such written document to John Kilo during the meeting [**Tr. II at 159, lines 4-25, at 160, lines 1-17, at 161, at 6-25, at 162, lines 1-25, at 163, lines 1-25, at 164, lines 1-25, at 165, lines 1-25, at 166, lines 1-25, at 167, lines 1-9; see also Respondent's Exhibits "C", "C-2", and "C-3"**]. The "writing" (i.e. the "envelope") concerning the fee-division arrangement and the other conditions, stated essentially as follows:

a. Pay Respondent $75,000 base annual salary, plus discretionary bonuses as a result of Respondent's legal services to be rendered to KCK's clients;

b. Respondent be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients;

c. Immediately make Respondent a law partner of KCK;

d. Immediately advance Respondent Fifty Thousand Dollars ($50,000.00) against his future net earnings from KCK in excess of One Hundred Thousand Dollars ($100,000.00) ("Advance").

During the aforementioned meeting between Respondent and John Kilo in January 1994, Respondent discussed the conditions on the envelope that KCK needed to meet before he would consider staying at KCK. Respondent also discussed with John Kilo the contents on the documents contained in the envelope—Respondent's compensation schedule for the then 10 years he was employed at KCK, and Respondent's then last payroll check stub from KCK [**Tr. II at 161, at 6-25, at 162, lines 1-25, at 163, lines 1-25, at 164, lines 1-25, at 165, lines 1-25, at 166, lines 1-25, at 167, lines 1-9; see also Respondent's Exhibits "C", "C-2", and "C-3"**].

John Kilo testified that before the aforementioned meeting between him and Respondent in January 1994, he talked to Ed Cody and Vic Klutho—the other senior partners of KCK—and said he "was going to meet with Dan Kazanas, that he was going to talk about…partnership" [**Tr. I at 115, lines 17-23, at 121, lines 13-18**]. John Kilo

testified that at the aforementioned meeting between him and Respondent, "we talked about an [salary] increase", "partnership", that Respondent did not make any "absolute demands", but did talk about "some other job opportunities", that Respondent wanted to be made a shareholder of KCK, that "we might have discussed" about Respondent's name being added to the name of the firm, and that there "might have been some discussions of additional loans at that time, but there was no demands that, 'If you don't make me this loan, I'm leaving'" [**Tr. I at 115, lines 17-25, at 116, lines 1-23, at 117, lines 10-16, at 119, line 25, at 120, lines 1-10**]. During the hearing in the presence of the Master, John Kilo did not "emphatically" denied the fee-division arrangement between KCK and Respondent [**Master's Report at para. 4, page 3**]; instead John Kilo testified on cross-examination that "I don't recall there being any" fee-division arrangement being discussed between him and Respondent [**Tr. I at 196, lines 8-24**].

At the aforementioned meeting between Respondent and John Kilo in January 1994, John Kilo represented to Respondent, among other things, that, if he agreed to stay at KCK:

a. KCK would provide Respondent the equivalent of a $75,000 base annual salary, by paying Respondent an annual base salary of $72,000 and paying Respondent an automobile allowance of $2,400 annually which if taxable to Respondent would be equivalent to $3,000 annually, which was done [**Tr. I at 122, lines 3-10, at 197, lines 9-25, at 198, lines 1-3**], plus discretionary bonuses as a result of Respondent's legal services to

be rendered to KCK's clients [**Tr. II at 168, lines 12-25, at 169, lines 1-5**];

b. Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to the fee-division arrangement [**Tr. II at 168, lines 4-11**];

c. KCK would immediately make Respondent a law partner (i.e. shareholder) of KCK [**Tr. II at 167, lines 23-25, at 168, lines 1-3**], which was done [**Tr. I, at 122, lines 18-25, at 185, lines 2-25, at 188, lines 16-23**]; and

d. John Kilo would discuss with Ed Cody and Vic Klutho about KCK providing the Advance to Respondent [**Tr. II at 167, lines 21-22**].

The next day or so following the aforementioned meeting between Respondent and John Kilo in January 1994, John Kilo informed Respondent that Ed Cody and Vic Klutho "won't go along" with the Advance, but that John Kilo would provide the money to Respondent from his own personal account [**Tr. II at 170, line 25, at 171, lines 1-5], which was done [Tr. I at 123, lines 20-23**].

In reliance upon the representations of John Kilo, Respondent agreed to stay with KCK [**Tr. II at 172, lines 4-25. at 173, lines 1-6**]. Respondent requested John Kilo to set forth his representations in writing, but John Kilo refused, stating that "My word is my

bond, and that should be good enough for you"[2] [**Tr. II at 173, lines 7-15**]. Respondent did not discuss with any other partner or associate of KCK, other than John Kilo, the fee-division arrangement because Respondent (along with all other attorneys with KCK) was "strictly admonished not to discuss the amounts [salaries, bonuses, and other compensation arrangements] with each other" [**Master's Report at para. 2, page 3**]. In addition, Robert Trame, a shareholder lawyer at KCK, testified that compensation of shareholder lawyers of KCK was not something that the shareholder lawyers shared with any of the people working for the firm [**Tr. I at 261, lines 16-25**].

Within a day or so following the aforementioned meeting between Respondent and John Kilo in January 1994, Respondent discussed with several of his trusted friends, which included Peter Katsinas and Nick Karakas (who were willing to financially and otherwise support Respondent with his new law firm) the contents of Respondent's meeting with John Kilo. Specifically, Respondent discussed with his trusted friends John Kilo's commitment on behalf of KCK that Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to the fee-

[2] It should be noted that on June 8, 1999, John Kilo told a special agent of the Internal Revenue Service assigned to the investigation of Respondent that Respondent's agreement as to his compensation was not in writing; that KCK operated in trust; and that the other partners of KCK did not know about his personal loans to Respondent (i.e. Advance) until after Respondent left KCK in January 1997 [**See Paras. 2 and 3 of Respondent's Exhibit "VV"**].

division arrangement [**Tr. II at 171, line 3-21**]. Both Peter Katsinas and Nick Karakas testified that in early 1994, they recall Respondent stating to them certain contents of John Kilo's commitment on behalf of KCK that Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients [**Tr. I at 335, lines 1-25, at 336, lines 1-25, at 337, lines 1-9; and at 320, lines 20-25, at 321, lines 1-20**]. Both also recommended to Respondent that he remain with KCK based upon John Kilo's commitment on behalf of KCK, so Respondent called Margaret Grinstead at home and told her that he was going to stay at KCK, and also told her the reasons why [**Tr. II at 171, lines 22-25, at 172, lines 1-3**].

Margaret Grinstead, a legal secretary for over twenty-four years, currently employed at Lewis Rice & Fingersh--a large St. Louis downtown law firm, testified that in late December 1993, while she was employed with Respondent at KCK, Respondent invited her and she accepted the offer to join Respondent in his new law firm practice [**Tr. II at 129, lines 15-25, at 130, lines 1-20, 131, lines 9-20**]. Margaret Grinstead further testified that shortly thereafter, she and Respondent visited the new law offices; however, Respondent told her in January 1994 that he decided to remain at KCK because "he told me that he was going to get a substantial increase [in pay], and that he was also going to get a percentage of his clients [fees]…. I want to say it was 30 percent," [3] [**Tr. II at 131, lines 23-25, at 132, lines 1-25**].

[3] John Kilo testified that he "would not say that" Margaret Grinstead would lie to help Respondent [**Tr. I at 180, lines 19-21**]. Robert Trame, also a shareholder lawyer at

Steven Stenger, a lawyer and former law partner of Respondent, testified that while listening in on a telephone conversation between Respondent and John Kilo in May 1998, there was " talk of – in general terms of an agreement between the parties", and later in the conversation:

> "Dan had said to John something along the lines of, in substance, 'We had an agreement,' and Kilo retorted that it was never written in stone, something to that effect, but I remember the 'written in stone' or 'etched in stone' part of it particularly."

[**Tr. II at 7, lines 7-20, at 9, lines 9-25, at 10, lines 1-5**]

Steven Stenger further testified that on the same day of the certain telephone conversation between Respondent and John Kilo in May 1998, he recalls Respondent saying to him " that in effect he had memorialized this agreement he had with John Kilo, … and the next day or the following day he produced the envelope to me and showed it to me, … certain terms that were – that were on this envelope…." [**Tr. II at 17, at 8-25, at 18, lines 1-6**].

e) <u>Respondent's procedure in administering fee-division arrangement</u>.

Expecting KCK to honor its commitment to Respondent of the fee-division arrangement, as John Kilo had represented, Respondent remitted to KCK what he believed was one hundred percent (100%) of the fees collected from "his" cases or from

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KCK, testified that Margaret Grinstead was reliable, competent, and *truthful* [**Tr. I at 255, lines 19-25, at 256, lines 1-2**].

"his" clients until November 1994 [**See the hereinafter-defined Culp's Report (i.e. Respondent's Exhibit "A"**)]. As of October 1994, Respondent had asked John Kilo several times "when am I going to get my money", or words to that effect, and John Kilo always had reasons or excuses for KCK not paying, such as "cash flow problems" [**Tr. II at 176, lines 6-25, at 177, lines 1-25, at 178, lines 1-21**]. After KCK failed to honor its arrangement that Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients, Respondent told John Kilo in October 1994 that: "Well, I've been honoring the agreement. I'm going to continue to honor the agreement, and I'm going to enforce the agreement" [**Tr. II at 178, lines 21-24**]. Margaret Grinstead also testified that "a year or so later" after January 1994, Respondent "told me – that they [KCK] had not lived up to what they had said, to the terms of the agreement that he had made" [**Tr. II at 133, lines 4-14**].

Thereafter, commencing in November 1994, Respondent modified his procedure for handling the fees collected from "his" cases or from "his" clients [**Tr. II at 182, lines 18-25, at 183, lines 1-22**]; but Respondent still ensured that KCK was always in receipt of seventy percent (70%) of fees collected from "his" cases or from "his" clients—its share pursuant to the agreement that was made in January 1994 [**Tr. II at 188, lines 4-12, in which Respondent's statement is supported by the hereinafter-defined Culp's Report (i.e. Respondent's Exhibit "A")**]. Respondent's modified procedure was to engage in self-enforcement by retaining certain fee checks collected from "his" cases or from "his" clients. Respondent "without a doubt" rues the day he ever did that, knows that it was "poor judgment and outright stupid" [**Tr. II at 177, lines 13-23, 188, lines 20-**

25, at 189, lines 1-15], and as elaborated hereinafter in this brief, admitted that self-enforcement of the fee-division arrangement was wrong and against the professional rules of conduct for an attorney practicing in the State of Missouri.

The certain fee checks collected from Respondent's cases or from "his" clients that were retained by Respondent were payments for legal services already rendered by Respondent on behalf of these clients, and not funds belonging to these clients (i.e. not "client funds"). Informant conceded in this case, "we don't have any evidence that any clients are out any money" [**Tr. I at 49, lines 21 and 22**].

The certain fee checks that were retained by Respondent were checks that either had Respondent or KCK listed as the payee [**Stipulation Para. 5**]. For *all* the retained checks that listed KCK as the payee, Respondent signed the back of the checks with his name *and* John Kilo's name, next to a pre-printed "return address" stamp of the name of KCK, which stamp was continuously available to all employees of KCK, stored by the receptionist desk at KCK [**Tr. I at 132, lines 18-25, at 133, lines 1-3, Tr. II at 185, lines 5-25, at 186, lines 1-21**]. Respondent testified that when he was a lawyer at KCK, on many occasions it was required of him to sign John Kilo's name, with his knowledge and consent, on certain pleadings, letters, tax forms, etc. [**Tr. II at 187, lines 1-16**]. *All* the certain fee checks that were retained by Respondent (i.e. checks that either had Respondent or KCK listed as the payee) were deposited into Respondent's checking account.

f) Client billing records in administering fee-division arrangement.

The client billing records to determine when fees collected from Respondent's cases or from "his" clients were either deposited into KCK's checking account or deposited into Respondent's checking account *were there at KCK the whole time*, as verified by Jeffrey Jenson, the FBI agent assigned to the investigation of Respondent [**Tr. I at 44, lines 20-25, at 45, lines 1-12**]. Jeffrey Jenson, however, acknowledged that he did not determine the total amount of legal fees generated by Respondent in the years 1994, 1995 and 1996, regardless of whether they were deposited to KCK's checking account or to Respondent's checking account [**Tr. I at 40, lines 10-19**], nor did he determine if the legal fees generated by Respondent in the years 1994, 1995 and 1996 that were deposited to Respondent's checking account was in conformance with the 70/30 fee-division arrangement [**Tr. I at 54, lines 16-24**]. Jeffrey Jenson further acknowledged that he did not interview the "underlying person" (i.e. Angela Carter) who did the recording of client payments and credits of legal fees at KCK during the relevant period [**Tr. I at 44, lines 11-19**].

Angela Carter (a paralegal currently employed at Greensfelder, Hemker & Gale--a large St. Louis downtown law firm) was employed at KCK from June 1992 through June 1998. While Angela Carter was employed at KCK, there was "probably not" anybody more involved in handling the legal fee bills and the payments on the legal fee

bills at KCK than her[4] [**Tr. I at 342, lines 20-25, at 343, lines 1-2, at 345, lines 23-25, at 346, lines 1-5**].

Angela Carter testified; (i) that the lawyers at KCK had numerous different billing procedures; (ii) that only Respondent "consistently" used the TABS computer software-billing program for purpose of generating legal fee statements of "his" cases to be delivered to "his" clients; and (iii) that Robert Trame, who Informant used as a witness to explained Respondent's billing practices, "never" really used TABS program, but instead prepared summary style invoices from his own kept time records [**Tr. I at 346, lines 6-25, at 347, lines 1-14, at 365, lines 1-8; see also Respondent's Exhibits "B" and "FF"**].

Angela Carter also testified: (i) that all payments related to all of Respondent's legal fee statements were given to him by KCK personnel when received from such clients [**Tr. I at 352, lines 8-12**]; (ii) that there was never a time that Respondent directed her to do anything insofar as billing or receipts that she considered improper or inappropriate [**Tr. I at 347, lines 15-21**]; (iii) that she does not ever recall Respondent hiding information from her or hiding checks from her [**Tr. I at 352, lines 19-21**]; (iv)

[4] John Kilo testified that Angela Carter was competent, and that "she did a good job" while employed at KCK [**Tr. I at 179, lines 17-25, at 180, line 1**]. Robert Trame also testified that Angela Carter was competent while employed at KCK [**Tr. I at 253, lines 14-20**].

that she does not ever recall Respondent every telling her to, "Don't tell the other lawyers about this," or, "Don't show them this," or, "Don't show them that," or, "Hide this", and that "I don't see him [Respondent] ever putting me in that position to ask me to do that." [**Tr. I at lines 23-25, at 353, lines 1-6**]; (v) that when Respondent "as well as other attorneys at the firm" informed her that a payment for legal services was made by a client, but if she "actually didn't have a payment that I could record" then "I would just put 'credit per,' and then their initials" on the legal fee statements [**Tr. I at 347, lines 22-25, at 348, lines 1-25, at 349, lines 1-25, at 350, lines 1-25, at 351, lines 1-12, at 366, lines 19-25, at 367, lines 1-25, 368, lines 1-25, at 369, lines 1-5**]; (vi) that all payments from legal fee statements of Respondent's cases that were delivered to "his" clients were posted in Respondent's client ledgers[5] that were kept by KCK's billing clerk "on a shelf in the corner right up by the [KCK's] reception area" [**Tr. I at 357, lines 2-4, at 367, lines 13-25, at 368, lines 1-11**] and (vii) that copies of all of Respondent's legal fee statements were kept by KCK's billing clerk "in boxes up underneath a table up by my desk" [**Tr. I at 369, lines 2-5**].

[5] "Client ledgers" were what the books were called at KCK that had the client's name, the client file number, charges for the legal services and expenses performed by the attorney, and payments made by the various clients [**Tr. at 96, lines 12-16**].

g) <u>Respondent's reporting of retained checks to the taxing authorities.</u>

When it was time for Respondent to file his individual income tax returns, Respondent reported on his Schedule "C" (income from a sole proprietorship) of his 1995 and 1996 income tax returns "exactly 30% of the 30% he had" retained pursuant to the fee-division arrangement [**Master's Report at para. 2, page 6**]. Respondent subsequently stated that if his Schedule C Income for tax years 1995 and 1996 had not been reported correctly it was a mistake and that he would make up the difference [**Master's Report at para. 5, page 6; see also Tr. I at 19, lines 23-25, at 20, lines 1-3**]. Respondent also subsequently acknowledged that it was a reckless disregard of a known legal duty in which he calculated and reported to the taxing authorities his portion of his thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to fee-division arrangement. Respondent testified that the other retained legal fees (i.e. 70%) that were not reported (and at *that time* he assumed did not have to be reported) on his Schedule C were funds that were going to be paid to KCK when KCK paid Respondent the 30% of the legal fees that he already turned-over to KCK. Respondent further testified that the "exchange of checks" while less convenient, he *then* believed that it would have more accurately reflected the economics circumstances of the transactions [**Tr. II at 233, lines 5-25, at 234, lines 1-25, at 235, lines 1-25, at 236, lines 1-25, at 237, lines 1-19; see also Respondent's Exhibit "D"**].

Also, when it was time for Respondent to file his individual income tax returns, Respondent completed Schedule SE reports of his 1995 and 1996 income tax returns for

self-employment taxes for the "exactly 30% of the 30% he had" retained pursuant to fee-division arrangement [**See Respondent's Exhibits "H" and "I"**]. [6]

The IRS' civil audit of Respondent concluded that the total underreported taxes for tax year 1995 was $11,441.51, and the total underreported taxes for tax year 1996 was $11,587.47 [**See Respondent's Exhibit "U"**].

Calvin Culp, retired thirty-year veteran as a Special Agent in the Criminal Investigation Division of Internal Revenue Service, testified on behalf of Respondent as to the accounting of fees collected from Respondent's cases or from "his" clients. Calvin Culp, before he began working on Respondent's case, had investigated on behalf of the United States Government anywhere from a half of a dozen to a dozen cases in which there were allegations of corporate embezzlement [7] [**Tr. II at 48, lines 19-25, at 49, lines 1-9**].

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[6] Other telling examples of Respondent's conscious efforts of reporting to taxing authorities of apparent income was Respondent reporting income and paying taxes on his 1994 Individual Income Tax Return for "forgiveness of debt " [**Tr. I at 62, lines 21-25; Respondent's Exhibit "G"**] and reporting on his 1995 Individual Income Tax Return his Form 1099 income from other employment [**See Respondent's Exhibit "H"**].

[7] Calvin Culp, a resident of Jefferson City, Missouri, is currently a contract investigator for the Missouri state agency of Professional Registration, and before that was an investigator for the Missouri Senate [**Tr. II at 46, lines 11-25**]. Before this Hearing of Respondent, Calvin Culp had testified in court only for the government "fifty or so

Calvin Culp reviewed and analyzed a substantial amount of documents from Respondent, including client ledgers, client billing records, photocopies of all the receipts received by Respondent from clients, banking records of Respondent, documents from KCK, documents from various clients of Respondent, and documents from the U.S. Attorney's Office [**Tr. II at 51, lines 18-25, at 52, lines 1-18, at 53, lines 22-25, at 54, line 1, at 71, lines 9-22**]. Calvin Culp did not assume that cases with Respondent's initials were Respondent's cases solely based on the assumption and direction of Respondent. The results of Calvin Culp's review and analysis were as follows:

(1) The financial transactions of legal fees collected from Respondent's cases or from "his" clients were summarized in a schedule identified as Respondent's Exhibit "A" [**Tr. II at 53, lines 15-21, at 54, lines 2-7, at 59, line 25, at 60, lines 1-12] (a/k/a "Culp's Report"**);

(2) Culp's Report was prepared in the way and manner in which Calvin Culp was trained, in which he conducted his investigations as a special agent for the IRS, and in a format used by the IRS [**Tr. II at 21-25, at 55, lines 1-11**];

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times," and never for a defendant or respondent [**Tr. II at 49, lines 21-25, at 50, lines 1-11**]. The last ten years Calvin Culp worked as a special agent for the IRS, he received as many or more professional awards than any other special agent in the IRS, and was the IRS special agent of the year one year [**Tr. II at 48, lines 11-18**].

(3) Culp's Report accounted for the client fee checks pertaining to Respondent whether they were deposited into KCK's checking account or deposited into Respondent's checking account [**Tr. II at 59, line 25, at 60, lines 1-5**];

(4) All of the funds stated in Culp's Report were from clients listed as clients of Respondent in Respondent's client ledgers [8] [**Tr. II at 60, lines 6-12**];

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[8] Informant alleges that several clients on Culp's Report were never Respondent's clients and tried to support its claim by referring to the testimony of Robert Trame, a lawyer with KCK. Robert Trame, however, testified only to allegedly "names of clients who were not originated, brought into the firm by" Respondent [**Tr. II at 315, lines 18-20**], which is different than those clients in which fees were collected from Respondent's cases or from "his" clients for purpose of the fee-division arrangement. Furthermore, Robert Trame did not review Respondent's client ledgers in preparation of his testimony, and Robert Trame conceded that he was not privy to Respondent's opinion as to what clients were used to determine the fee division arrangement [**Tr. II at 316, line 25, at 317, line 1-12**]. It should also be noted that many of the client names given by Robert Trame in his testimony [**Tr. II at 316, lines 2-18**] were clients that provided written testimonials [**See Respondent's Exhibit "L" to Response of Respondent to Order to Show Cause filed October 30, 2000; see Stipulation Para.15**] to this Court who have bare witness as to Respondent's favorable character and excellent reputation for integrity,

(5) There were documents that Calvin Culp reviewed and analyzed "that indicated that what he [Respondent] was saying [Respondent was to receive a percentage of all receipts collected from "his" cases or from "his" clients] was correct" [**Tr. II at 52, lines 19-25, at 53, lines 14**];

(6) Respondent actually undercharged his clients on several occasions, rather than what the federal government originally alleged was the source of the unreported receipts, which was that he inflated his bills to his clients [**Tr. II at 70, lines 9-25, at 71, lines 1-8 and 23-25, at 72, lines 3-10, at 73, lines 9-25, at 74, lines 1-25, at 75, lines 1-25, at 76, lines 1-25, at 77, lines 1-25, at 78, lines 1-7; see also Respondent's Exhibit "UU", and Para. 5.D) of Informant's Exhibit "19"**][9];

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honesty, loyalty, competency, and dedication to his family, church, legal profession, and community.

[9] Jeffrey Jenson acknowledged that anything he may know about the billing amounts that were set forth on Respondent's legal fee billing records to Respondent's clients is "absolutely" strictly hearsay [**Tr. I 64, lines 16-19**]. Angela Carter testified that she does not ever recall a time when Respondent would write a legal fee bill down and then send out a higher legal fee bill to the client so that it would look like on the records of KCK that a lower bill had been sent, but in fact a higher bill had been sent, and if something

(7) Culp's Report concluded that not only was KCK always in receipt of at least seventy percent (70%) of fees collected from Respondent's cases or from "his" clients, but also Calvin Culp testified that if there was in fact a 70/30 fee-division arrangement, there was still an amount due and owing Respondent from KCK as of December 31, 1996[10] [**Tr. II at 70, lines 2-8**];

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like this would have happened, that she would know [**Tr. I at 351, lines 13-25, at 352, lines 1-2**].

[10] In Culp's Report there is listed a relatively small amount of checks in January 1994 that were retained by Respondent. Respondent testified that the monies from such checks were used with the knowledge and consent of John Kilo to purchase certain law books and certain furniture that Respondent needed when he was starting his new law firm in January 1994 [**Tr. II at 156, lines 14-22, at 169, lines 18-25, at 170, lines 1-19, at 180, lines 5-25, at 181, lines 1-8**]. Even though such furniture was ultimately used in KCK's offices, Calvin Culp still credited Respondent all of such monies against the thirty percent (30%) of the fees collected from his own clients that Respondent was entitled to pursuant to the fee-division arrangement. Also, there was a single check from one of Respondent's clients that in April 1994 was inadvertently deposited in Respondent's checking account along with certain checks from certain employees at KCK that were collected by Respondent about the same time on behalf of one of Respondent's daughters for girl scout cookie monies [**Tr. II at 181, lines 9-25, at 182, lines 1-17**].

(8) Specifically, Culp's Report concluded the following:

	1994	1995	1996	Total $	Total %
Fees collected from Respondent's cases or from "his" clients that were given to KCK:	$90,003.38	$175,603.93	$124,291.75	$389,899.06	78.7%
Fees collected from Respondent's cases or from "his" clients that were retained by Respondent:	$8,835.42	$42,522.51	$53,859.30	$105,217.23	21.3%
Total fees collected from Respondent's cases or from "his" clients:	$98,838.81	$218,216.44	$178,151.05	$495,206.30	100.0%

(9) When Respondent provided his resignation to KCK in late 1996, KCK owed Respondent approximately $43,333.87 pursuant to the fee-division arrangement [**See Para. 5.F) of Informant's Exhibit "19"**];

(10) Calvin Culp also testified that in all of the embezzlement or stealing, per se cases investigated by Criminal Investigation Division of the IRS, which Calvin Culp had knowledge or information about, never did any of those accused do what Respondent did, which was make

no attempt to conceal receipt of the retained fees by depositing all of these fees (and for that matter, all of his receipts) into his checking account, and thereafter, including on his Schedule C of his 1995 and 1996 income tax returns a substantial portion of the retained fees that needed to be reported for income tax proposes (even though he did not receive any Form W-2 or Form 1099 for such funds) and also, completing and paying for both tax years 1995 and 1996, Schedule SE for self-employment taxes [**Tr. II at 114, lines 3-25, at 115, lines 1-2, at 116, lines 1-25, at 117, lines 1-12; see also Para. 5.E) of Informant's Exhibit "19"**];

(11) Calvin Culp also testified that if the federal government's tax computations had included the additional allowable business deductions to which Respondent was entitled, not included barter income fees that should not have been included in the criminal tax computations and if the federal government had properly computed the financial transactions by not including client funds that were in fact turned over by Respondent to the clients, it would have further reduced the additional tax due that was borderline *de minimus* per the Indictment issued against Respondent by U.S. Attorney's Office for the Eastern District of Missouri [**Tr. II at 80, lines 2-25, at 81, lines 1-25, at 82, lines 1-19 ; see also Respondent's Exhibit "U", and Para. 5.G) of Informant's Exhibit "19"**]; and

(12) Calvin Culp also testified that the federal criminal court case against Respondent would not have been pursued on an averaged citizen because "its clear and convincing" [**Tr. II at 82, lines 20-24**] such case did not comply with the Law Enforcement Manual criteria for prosecution; however, Calvin Culp believed that because Respondent is a lawyer there appeared to be a considerable amount of selectivity in his prosecution. Under the Law Enforcement Manual, the federal government is required to show that an "average" citizen had underreported taxes by a total of at least $25,000 when utilizing a "specific item" method of proof before the U.S. Dept. of Justice-Tax Division authorizes prosecution. [**Tr. II at 78, lines 8-25, at 79, lines 1-25, at 119, lines 16-25, at 120, lines 1-25, at 121, lines 1-8, at 123, lines 5-15; see also Para. 5.H) of Informant's Exhibit "19"**].

h) <u>Respondent's resignation from KCK in January 1997.</u>

In January 1997, Respondent again resigned from KCK [**Stipulation Para. 4**]. Thereafter, in January 1997, Respondent agreed: (1) to provide a written status report to KCK regarding John Kilo, Vic Klutho and Ed Cody's cases on which Respondent had been providing legal services, which he provided; (2) to leave three of his own clients' files with KCK for resolution, which were contingency fee cases, which he did; and (3) to pay to KCK, an amount to be agreed upon for KCK's portion of Respondent's clients' receivables that had not been collected, which he paid [**Tr. II at 199, lines 19-**

25, at 200, lines 1-25, at 201, at lines 1-25, at 202, lines 1-25, at 203, lines 1 and 2; see also Respondent's Exhibit "CC"]. John Kilo individually negotiated with Respondent for an amount Respondent was to pay KCK for the then outstanding accounts receivable of Respondent's clients, in exchange of Respondent taking such receivables to his new law firm, along with the legal services rendered to his own clients in 1996, which had not yet been billed, and billing such legal services from Respondent's new law firm for Respondent's own benefit [**Tr. I at 128, lines 15-25, at 129, lines 1-25, at 130, line 1; see also Respondent's Exhibit's "BB" which set forth the disposition of clients that Respondent was taking with him, along with the billings associated with such clients, to his new law firm**].

After the last of the three of Respondent's own clients' files with KCK for resolution, which were contingency fee cases, was removed from KCK by the client in April 1998, Respondent was having resolution discussions, mainly by telephone, with John Kilo in an attempt to make an accurate accounting with John Kilo for the fees he earned on his client files at KCK for the period of 1994--1997.[11] Respondent chose to

[11] Respondent also specifically disclosed, before any government investigation was ongoing against him, to his then law partners Michael H. Izsak, and Brian D. Klar (which law partners were previously law partners at KCK as recently as June 15, 1998) his retention of checks for the fees he earned on his own client files at KCK for the period of 1994–1997 (**See both Respondent's Exhibit "G", paragraphs 38-50, and Respondent's Exhibit "H", paragraphs 40-49, affidavits of Michael H. Izsak and**

have resolution discussions with John Kilo because John Kilo usually solely made major decisions affecting Respondent at KCK.

i) <u>John Kilo usually solely made major decisions affecting Respondent at KCK.</u>

During the aforementioned meeting between Respondent and John Kilo in January 1994, John Kilo stated to Respondent that he was speaking on behalf of the other members of the executive committee of KCK (i.e. Ed Cody and Vic Klutho) [**Tr. II at 161, lines 8-13**]. John Kilo testified that KCK is managed by the executive committee which during the relevant period was Vic Klutho, Ed Cody and John Kilo, and that all the major decision were made by the executive committee [**Tr. I at 96, lines 15-16, at 97, lines 1-18**]; however, the custom and practice of major decisions affecting Respondent at KCK were usually solely made by John Kilo (i.e. Respondent's "personal supervisor" [**See Master's Report at para. 5, page 2**]), and apparently without the prior knowledge or consent of any other partner or associate of KCK, including sometimes even Respondent. For example: (i) John Kilo provided money to Respondent from his own personal account, which was to be repaid and was repaid in part by Respondent from the "discretionary bonuses" Respondent received from KCK [**Tr. II at 149, lines 15-25, at 150, lines 1-25, at 164, lines 5-21**]; yet the other partners of KCK did not know about these personal loans to Respondent nor their connection to the "discretionary bonuses"

Brian D. Klar which were attached to Respondent's Response to Order to Show Cause filed with this Court on October 30, 2000; see also Stipulation Para. 15).

until after Respondent left KCK in January 1997 [**See Paras. 2 and 3 of Respondent's Exhibit "VV"; Tr. I at 210, lines 17-23**]; (ii) In the spring of 1995, John Kilo requested Respondent to obtain life insurance coverage to insure repayment of the Advance from John Kilo to Respondent. *Unbeknownst to Respondent*, John Kilo got a hold of Respondent's application and crossed out Respondent's signature as "Applicant/Owner" and signed his own name as the "Applicant/Owner" and made other alterations to the life insurance application. As a result of the altered application, State Farm Insurance issued a policy on Respondent's life to John Kilo, as the Applicant and Owner; designated Respondent's employer as "John and Susan Kilo", which they were not; designated John Kilo and Susan Kilo as the primary and only beneficiaries of the life insurance policy; designated John Kilo's daughter as the sole successor beneficiary of the life insurance policy; failed to list Respondent's wife's name as the beneficiary of the life insurance policy; and sent the life insurance policy and correspondence relevant thereto to John Kilo at his home address, all also *unbeknownst to Respondent* [12] [**See Respondent's**

[12] As of August 4, 2000, Respondent owed no money to John Kilo; yet, John Kilo continued to keep in force the certain life insurance policy that he wrongfully owned on the life of Respondent [**Tr. I at 194, lines 8-10**]. In January 2001, Respondent received written notification from Informant that stated due to the nature of the allegations that John Kilo may have altered certain life insurance policy documents (i.e. "illegal activity") pertaining to Respondent, a law enforcement agency is the proper entity to initially

Exhibit "T", and Tr. I at 205, lines 9-25, at 206, lines 1-25, at 207, lines 1-22]; and (iii) After Respondent resigned again from KCK in January 1997, John Kilo individually negotiated with Respondent for an amount Respondent was to pay KCK for the then outstanding accounts receivable of "his" cases or "his" clients, in exchange of Respondent taking such receivables to his new law firm, along with the legal services rendered on "his" cases or "his" clients in 1996, which had not yet been billed, and billing such legal services from Respondent's new law firm for Respondent's own benefit [**Tr. I at 128, lines 15-25, at 129, lines 1-25, at 130, line 1; see also Respondent's Exhibit's "BB"** which set forth the disposition of clients that Respondent was taking with him, along with the billings associated with such clients, to his new law firm].

j) <u>Federal criminal case against Respondent</u>.

On November 4, 1999, the Grand Jury in the United States District Court for the Eastern District of Missouri returned a nine-count indictment against Respondent ("Indictment"). The Grand Jury charged Respondent with devising a scheme and artifice to defraud KCK by obtaining money by means of false pretenses (i.e. allegations of misappropriation of checks) and using the U.S. mails for the purpose of executing the scheme (Seven counts) and, subscribing under the penalties of perjury, Form 1040 for the tax years 1995 and 1996 and filing them with the Director, Internal Revenue Service knowing that the Forms were not true and correct (Two counts) [**Stipulation Para. 6;**

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investigate this matter [**See Respondent's Exhibit "T", and Tr. I at 205, lines 9-25, at 206, lines 1-25, at 207, lines 1-22**].

Stipulation Exhibit "3"]. Before the issuance of the Indictment, Respondent fully apprised Informant and Respondent's clientele that he was the subject of a federal criminal investigation and that the Indictment was forthcoming [**Stipulation Paras. 11(a) and 11(b); Stipulation Exhibits "8" and "9"**].

On May 1, 2000, Respondent entered a plea of guilty, conditioned upon U.S. District Court Chief Judge Jean Hamilton's acceptance, to one count of violating Title 26, United States Code, Section 7206(1), by underreporting his 1996 income on Schedule "C" (income from a sole proprietorship). Respondent's conditional plea was pursuant to a written plea agreement titled "Stipulation of Facts Relative to Sentencing" that Respondent entered into on May 1, 2000 ("Plea Agreement") [**Stipulation Para. 4, Stipulation Exhibit "4"**].

On August 4, 2000, Judge Jean Hamilton accepted Respondent's conditional plea and sentenced him to serve 6 months of home confinement; five (5) years probation; and, to pay into the Clerk of the Court One Hundred Dollars ($100.00) statutory assessment. Restitution is not a condition of Respondent's probation. Pursuant to the U.S. Government's motion, Judge Jean Hamilton dismissed the remaining eight counts of the Indictment against Respondent, seven of which were based upon the allegations of misappropriation of checks from KCK, and one based upon the allegation of violating Section 7206(1), by underreporting his 1995 income on Schedule "C". Respondent was not convicted of committing any wrong against KCK or any of the individual members or employees of said firm [**Stipulation Para. 8, Stipulation Exhibit "4"**].

As of August 4, 2000, the day of his sentencing, Respondent had voluntarily and ceased immediately practicing law [**Tr. II at 237, lines 20-25, at 238, lines 1-4; see also Master Exhibit "2"**].

k) <u>Respondent's lawsuit against KCK.</u>

In order to have a trier-of-fact settle the issue of the 70/30 fee-division arrangement, and specifically as to whether there was still an amount due and owing Respondent from KCK, Respondent commenced a lawsuit on September 21, 2000, in the Circuit Court of the City of St. Louis, Missouri, against KCK, John Kilo, State Farm Life Insurance Company, and Timothy Kilo, case no. 002-07781 ("Lawsuit") [**Stipulation Para. 25, and Stipulation Exhibit "20"**]. The Lawsuit included counts for fraud, breach of contract, intentional interference with business expectancy, and common law negligence.

The federal court judge in Respondent's case and Assistant U.S. Attorney Michael Reap anticipated litigation between Respondent and his prior law firm.

U.S. District Court Chief Judge Jean Hamilton stated:

> "I am not going to order mandatory restitution. I'm going to abide by what the parties agreed to. I realize there may be additional litigation and that's something for those individuals to pursue."

[**Stipulation Para. 8, and Stipulation Exhibit "5", page 17, lines 1 through 4 of Sentencing Hearing Transcript**].

Assistant U.S. Attorney Reap stated:

> "…as far as a sentence I stand by what is stipulated if the Court accepts the plea bargain….And I knew we were not going to get to total resolution. And, frankly, there's probably going to be a civil lawsuit and counterclaims and this is just going to go into another venue, which everyone has a right to do." (Emphasis added)

[**Stipulation Para. 8, and Stipulation Exhibit "5", page 8, lines 12 through 22 of Sentencing Hearing Transcript**].

Yet, on October 27, 2000, Assistant U.S. Attorney Reap filed his Motion to Revoke against Respondent [**Stipulation Exhibit "21"**], which made the argument in paragraph 5 that Respondent's filing his Lawsuit against KCK is "contrary to the spirit of that promise." On November 6, 2000, Assistant U.S. Attorney Reap filed his Supplemental Motion to Revoke against Respondent [**Stipulation Exhibit "22"**]. The Supplemental Motion to Revoke stated: (i) that Respondent's sentence was the result of the federal court granting "defendant Kazanas' Motion for Downward Departure under 5K2.0", when in fact the federal court *denied* such motion [**See page 14, lines 1 and 2 of Sentencing Hearing Transcript**]; and (ii) that the federal "Court can fashion a multitude of remedies" because "the actions of the defendant Kazanas are so violently in contradiction to the bargained agreement".

In neither Motions to Revoke did Assistant U.S. Attorney Reap mention, much less allege, that Respondent has not accepted nor fulfilled his conditions of probation

relating to his responsibilities to the Internal Revenue Service or any other condition of probation, the usual grounds for revocation of a defendant's sentence. See Title 18 U.S.C. Section 3565. In fact, during the hearing in the presence of the Master, Assistant U.S. Attorney Reap testified that "nothing" of a material nature has come to his attention to suggest that Respondent is not complying with all the terms, requirements, and restrictions of his probation [**Tr. I at 304, lines 1-10**].

Rather than continue with the financial and emotional toll thrust upon Respondent and his family while drawn in the federal courts' system, and after receiving written assurance from counsel for John Kilo that John Kilo would not renew the life insurance policy he owned on the life of Respondent [**Respondent's Exhibit "T"**], Respondent dismissed the Lawsuit upon the belief that such forward action would result in the Motions to Revoke to also be dismissed, which they were on March 2, 2002 [**Stipulation Para. 30**].

POINTS RELIED ON

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW IN THE STATE OF MISSOURI, RATHER THAT DISBAR RESPONDENT AS WAS THE ADVISORY OPINION OF THE MASTER, IN THAT:

I. RESPONDENT ADMITS THAT SELF-ENFORCEMENT OF THE FEE-DIVISION ARRANGEMENT WAS WRONG AND AGAINST THE PROFESSIONAL RULES OF CONDUCT FOR AN ATTORNEY PRACTICING IN THE STATE OF MISSOURI; HOWEVER, RESPONDENT HAS CONVINCIBLE AND CREDIBLE EVIDENCE TO SUPPORT HIS GOOD FAITH ARGUMENT OF ENTITLEMENT TO THE LEGAL FEES HE RETAINED ;

II. RESPONDENT'S VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 7206(1) DOES NOT ASCEND TO THAT LEVEL OF MORAL TURPITUDE THAT MANDATES DISBARMENT;

III. RESPONDENT STRICTLY ADHERED TO THE ADVICE AND COUNSEL OF HIS ATTORNEYS REPRESENTING HIM IN CONNECTION WITH HIS LAW LICENSE DISCIPLINARY MATTERS; AND

IV. THERE ARE OTHER COMPELLING MITIGATING REASONS THAT RESPONDENT RESPECTFULLY REQUESTS THIS COURT TO CONSIDER IN CONCLUDING THAT A SUSPENSION WOULD BE

ADEQUATE TO PROTECT THE PUBLIC INTEREST PARTICULARLY BECAUSE OF RESPONDENT'S FAVORABLE CHARACTER AND EXCELLENT REPUTATION FOR INTEGRITY, HONESTY, LOYALTY, COMPETENCY, AND DEDICATION TO HIS WIFE AND CHILDREN, CHURCH, LEGAL PROFESSION, AND COMMUNITY THROUGHOUT HIS SEVENTEEN-YEAR CAREER AS A LAWYER.

IN ADDITION, A SUSPENSION WOULD BE FULLY UNDER THE CONTROL OF THIS COURT, AS WOULD ANY FUTURE DECISION TO TERMINATE THE SUSPENSION.

United Stated vs. Pomponio, 429 U.S. 10, 97 S. Ct. 22, 50 L.Ed. 2nd 12 (1976)

In re Mirabile and In re Moroney, 975 S.W.2nd 936 (Mo. banc 1998)

In re McLeendon, 337 S.W.2nd 56 (Mo. banc 1960)

In re Oberhellmann, 873 S.W.2d 851 (Mo. banc 1994)

In re Charron, 918 S.W. 2d 257 (Mo. Banc 1996)

State ex rel. Nebraska State Bar Ass'n v. Frederiksen, 635 N.W.2d 427 (Neb.2001)

Gilbert v. United States, 370 U.S. 650, 82 S. Ct. 1399, 8 L.Ed. 2d 750 (1962)

ARGUMENT I.

RESPONDENT ADMITS THAT THE SELF-ENFORCEMENT OF THE FEE-DIVISION ARRANGEMENT WAS WRONG AND AGAINST THE PROFESSIONAL RULES OF CONDUCT FOR AN ATTORNEY PRACTICING IN THE STATE OF MISSOURI; HOWEVER, RESPONDENT HAS CONVINCIBLE AND CREDIBLE EVIDENCE TO SUPPORT HIS GOOD FAITH ARGUMENT OF ENTITLEMENT TO THE LEGAL FEES HE RETAINED.

The Missouri Rules of Professional Conduct guide the Supreme Court of Missouri in determining whether disciplinary action against a lawyer is warranted and if so, to what extent. The Preamble of Rule 4 of the Missouri Rules of Professional Conduct provides, in part, that "[a] lawyer's conduct should conform to the requirements of the law…in the lawyer's business and personal affairs." Rule 4-8.4 provides, in part, that is professional misconduct for a lawyer to:

> "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation…."

Throughout Respondent's seventeen-year career as a lawyer, he strived to exhibit the highest standards of honesty and integrity and the duty not to engage in conduct involving the commission of a crime, dishonesty, or fraud. Commencing in November 1994, Respondent, however, engaged in self-enforcement in handling the fees collected

from “his” cases or from “his” clients pursuant to the fee-division arrangement he had as a shareholder lawyer with KCK [**Tr. II at 182, lines 18-25, at 183, lines 1-22**]. Respondent acknowledges that in certain instances, misappropriation of monies entrusted to a lawyer could be a criminal act, or at least conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent “without a doubt” rues the day he engaged in self-enforcement of his fee-division arrangement, and knows that it was “poor judgment and outright stupid” [**Tr. II at 177, lines 13-23, 188, lines 20-25, at 189, lines 1-15**], but emphatically denies he stole or intended to steal monies from KCK as alleged by Informant. It is important to note that not only has there been no judicial determination that Respondent stole monies from KCK, but the allegations of such alleged misconduct against Respondent were dismissed by Judge Jean Hamilton (that is, Respondent was not convicted of committing any wrong against KCK or any of the individual members or employees of said firm) [**Stipulation Para. 8, Stipulation Exhibit “4”**].

Thus, Respondent admits that the self-enforcement of the fee-division arrangement was wrong and against the professional rules of conduct for an attorney practicing in the State of Missouri. Additionally, Respondent’s lack of forthrightness in handling the fees collected from “his” cases or from “his” clients pursuant to the certain fee-division arrangement violated Rule 4-8.4 (b) and (c) of the Missouri Rules of Professional Conduct. Respondent respectfully submits to this Court that the appropriate discipline for his wrongful conduct and lack of forthrightness should be a suspension of his license because, among other reasons discuss in this Brief, Respondent has convincible and

credible evidence to support his good faith argument of entitlement to the legal fees he retained.

In a disciplinary proceeding, the master's findings of fact, conclusions of law, and recommendation are advisory only and do not constitute evidence of professional misconduct. In re Oberhellmann, 873 S.W.2d 851, 852-53 (Mo. banc 1994); and In re Mirabile and In re Moroney, 975 S.W.2nd 936, 940 (Mo. banc 1998). This Court is not bound by master's findings in attorney disciplinary action. In re Littleton, 719 S.W.2d 772, 775 (Mo. banc 1986). Instead, this Court reviews the evidence *de novo*, determines independently all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. In re Oberhellmann, at 852-53. For example, this Court held in In re Charron, 918 S.W. 2d 257, (Mo. Banc 1996), that attorney misconduct, particularly misappropriation of $20,000 from probate estate by attorney, warranted suspension from the practice of law (rather than disbarment which was recommended by the master) with leave to apply for reinstatement in one year because this Court was presented with a factor not found in previous misappropriation cases—that the attorney—not unlike the Respondent in this case—had a legitimate claim for the funds and was truly owed the money. This Court further stated that "[w]hile this does not excuse the misappropriation, it does act in mitigation." Id. at 262.

Respondent testified that commencing in 1994, he was entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to a certain fee-division arrangement negotiated in mid January 1994 between him and John Kilo. The "writing" (i.e. the "envelope") concerning the fee-division arrangement, along with

certain other terms and conditions for Respondent to commit to continue to be associated with KCK, were essentially set forth on a certain envelope [**Tr. II at 159, lines 4-25, at 160, lines 1-17, at 161, at 6-25, at 162, lines 1-25, at 163, lines 1-25, at 164, lines 1-25, at 165, lines 1-25, at 166, lines 1-25, at 167, lines 1-9; see also Respondent's Exhibits "C", "C-2", and "C-3"**]. John Kilo testified that before the certain meeting between him and Respondent in January 1994, he talked to Ed Cody and Vic Klutho—the other senior partners of KCK—and said he "was going to meet with Dan Kazanas, that he was going to talk about…partnership" [**Tr. I at 115, lines 17-23, at 121, lines 13-18**]. John Kilo testified that at the aforementioned meeting between him and Respondent, "we talked about an [salary] increase", "partnership", that Respondent did not make any "absolute demands", but did talk about "some other job opportunities", that Respondent wanted to be made a shareholder of KCK, that "we might have discussed" about Respondent's name being added to the name of the firm, and that there "might have been some discussions of additional loans at that time, but there was no demands that, 'If you don't make me this loan, I'm leaving'" [**Tr. I at 115, lines 17-25, at 116, lines 1-23, at 117, lines 10-16, at 119, line 25, at 120, lines 1-10**].

During the hearing in the presence of the Master, John Kilo did not "emphatically" denied the fee-division arrangement between KCK and Respondent [**Master's Report at para. 4, page 3**]; instead John Kilo testified on cross-examination that "I don't recall there being any" fee-division arrangement being discussed between him and Respondent [**Tr. I at 196, lines 8-24**]. The Respondent submits to this Court that if John Kilo would have had an accurate recollection of the fee-division arrangement discussion, *and* would

have been willing to acknowledge such agreement then he would have probably been intensively confronted from his law partners and others regarding the promises that he made to Respondent and the actions that he took affecting Respondent that caused Respondent to reverse his decision to leave KCK in 1994, and become enmeshed at KCK for another three years. As stated in In re Littleton, *supra*, this Court determines independently all issues pertaining to credibility of witnesses.

At the aforementioned meeting between Respondent and John Kilo in January 1994, John Kilo represented to Respondent, among other things, that, if he agreed to stay at KCK, Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to the fee-division arrangement [**Tr. II at 168, lines 4-11**]. In reliance upon the representations of John Kilo, Respondent agreed to stay with KCK [**Tr. II at 172, lines 4-25. at 173, lines 1-6**].

Respondent requested John Kilo to set forth his representations in writing, but John Kilo refused, stating that "My word is my bond, and that should be good enough for you" [**Tr. II at 173, lines 7-15**]. Respondent did not discuss with any other partner or associate of KCK, other than John Kilo, the fee-division arrangement because Respondent (along with all other attorneys with KCK) was "strictly admonished not to discuss the amounts [salaries, bonuses, and other compensation arrangements] with each other" [**Master's Report at para. 2, page 3**]. In addition, Robert Trame, a shareholder lawyer at KCK, testified that compensation of shareholder lawyers of KCK was not something that the shareholder lawyers shared with any of the people working for the firm [**Tr. I at 261, lines 16-25**].

During the aforementioned meeting between Respondent and John Kilo in January 1994, John Kilo stated to Respondent that he was speaking on behalf of the other members of the executive committee of KCK (i.e. Ed Cody and Vic Klutho) [**Tr. II at 161, lines 8-13**]. John Kilo testified that KCK is managed by the executive committee which during the relevant period was Vic Klutho, Ed Cody and John Kilo, and that all the major decision were made by the executive committee [**Tr. I at 96, lines 15-16, at 97, lines 1-18**]; however, the custom and practice of major decisions affecting Respondent at KCK were usually solely made by John Kilo (i.e. Respondent's "personal supervisor" [**See Master's Report at para. 5, page 2**]), and apparently without the prior knowledge or consent of any other partner or associate of KCK, including sometimes even Respondent [**See discussion commencing on page 36 hereof**].

Within a day or so following the aforementioned meeting between Respondent and John Kilo in January 1994, Respondent discussed with several of his trusted friends, which included Peter Katsinas and Nick Karakas, John Kilo's commitment on behalf of KCK that Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to the fee-division arrangement [**Tr. II at 171, line 3-21**]. Both Peter Katsinas and Nick Karakas testified that in early 1994, they recall Respondent stating to them certain contents of John Kilo's commitment on behalf of KCK that Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients [**Tr. I at 335, lines 1-25, at 336, lines 1-25, at 337, lines 1-9; and at 320, lines 20-25, at 321, lines 1-20**].

Margaret Grinstead, a legal secretary for over twenty-four years, currently employed at Lewis Rice & Fingersh--a large St. Louis downtown law firm, testified that Respondent told her in January 1994 that he decided to remain at KCK because "he told me that he was going to get a substantial increase [in pay], and that he was also going to get a percentage of his clients [fees]…. I want to say it was 30 percent," [**Tr. II at 131, lines 23-25, at 132, lines 1-25**].

Steven Stenger, a lawyer and former law partner of Respondent, testified that while listening in on a telephone conversation between Respondent and John Kilo in May 1998, there was " talk of – in general terms of an agreement between the parties", and later in the conversation:

> "Dan had said to John something along the lines of, in substance, 'We had an agreement,' and Kilo retorted that it was never written in stone, something to that effect, but I remember the 'written in stone' or 'etched in stone' part of it particularly."
>
> [**Tr. II at 7, lines 7-20, at 9, lines 9-25, at 10, lines 1-5**]

Steven Stenger further testified that on the same day of the certain telephone conversation between Respondent and John Kilo in May 1998, he recalls Respondent saying to him " that in effect he had memorialized this agreement he had with John Kilo, … and the next day or the following day he produced the envelope to me and showed it to me, … certain terms that were – that were on this envelope…." [**Tr. II at 17, at 8-25, at 18, lines 1-6**].

Calvin Culp, retired thirty-year veteran as a Special Agent in the Criminal Investigation Division of Internal Revenue Service, reviewed and analyzed a substantial amount of documents from Respondent, including client ledgers, client billing records, photocopies of all the receipts received by Respondent from clients, banking records of Respondent, documents from KCK, documents from various clients of Respondent, and documents from the U.S. Attorney's Office [**Tr. II at 51, lines 18-25, at 52, lines 1-18, at 53, lines 22-25, at 54, line 1, at 71, lines 9-22**]. Calvin Culp testified that there were documents that Calvin Culp reviewed and analyzed "that indicated that what he [Respondent] was saying [Respondent was to receive a percentage of all receipts collected from "his" cases or from "his" clients] was correct" [**Tr. II at 52, lines 19-25, at 53, lines 14**].

Expecting KCK to honor its commitment to Respondent of the fee-division arrangement, as John Kilo had represented, Respondent remitted to KCK what he believed was one hundred percent (100%) of the fees collected from "his" cases or from "his" clients until November 1994 [**See Culp's Report (i.e. Respondent's Exhibit "A"**)]. As of October 1994, Respondent had asked John Kilo several times "when am I going to get my money", or words to that effect, and John Kilo always had reasons or excuses for KCK not paying, such as "cash flow problems" [**Tr. II at 176, lines 6-25, at 177, lines 1-25, at 178, lines 1-21**]. After KCK failed to honor its arrangement that Respondent would be entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients, Respondent told John Kilo in October 1994 that: "Well, I've been honoring the agreement. I'm going to continue to honor the agreement, and I'm

going to enforce the agreement" [**Tr. II at 178, lines 21-24**]. Margaret Grinstead also testified that "a year or so later" after January 1994, Respondent "told me – that they [KCK] had not lived up to what they had said, to the terms of the agreement that he had made" [**Tr. II at 133, lines 4-14**].

While Respondent was having his financial dispute with KCK regarding being entitled to thirty percent (30%) of the fees collected from "his" cases or from "his" clients pursuant to fee-division arrangement, he was a shareholder lawyer of KCK. **See Respondent's Exhibit "OO" which is a Certificate from this Court confirming that Respondent was a shareholder of KCK as early as May 1994.** See also Johnson v. Johnson, 764 S.W.2d 711,715 9 Mo. App. 1989); State ex rel. Gundaker and Williams v. Davis, 932 S.W.2d 885 (Mo. App. 1996) (a stock certificate is simply documentary evidence of title to a share of stock); and Kasier v. Moulton, 631 S.W.2d 44 (Mo. App. 1981) (title to the share may exist without a stock certificate).

Thereafter, commencing in November 1994, Respondent modified his procedure for handling the fees collected from "his" cases or from "his" clients [**Tr. II at 182, lines 18-25, at 183, lines 1-22**]; but Respondent still ensured that KCK was always in receipt of seventy percent (70%) of fees collected from "his" cases or from "his" clients—its share pursuant to the agreement that was made in January 1994 [**Tr. II at 188, lines 4-12, in which Respondent's statement is supported by Culp's Report (i.e. Respondent's Exhibit "A")**]. Calvin Culp testified that when Respondent provided his resignation to KCK in late 1996, KCK owed Respondent approximately $43,333.87 pursuant to the fee-

division arrangement [**See Para. 5.F) of Informant's Exhibit "19", and Culp's Report (i.e. Respondent's Exhibit "A")**].

The certain fee checks collected from Respondent's cases or from "his" clients that were retained by Respondent were payments for legal services already rendered by Respondent on behalf of these clients, and not funds belonging to these clients (i.e. not "client funds"). Informant conceded in this case, "we don't have any evidence that any clients are out any money" [**Tr. I at 49, lines 21 and 22**]. See also discussion in **ABA/BNA Lawyers' Manual on Professional Conduct 45:109 (1993)**, particularly the following:

> "The basic question is Whose money is it? If it's the client's money, in whole or in part, it is subject to the trust account requirements. If it is the lawyer's money, placing it into a trust account would violate the anti-commingling rule. In general, analysis turns on when the money is deemed "earned," for once money is earned it is the lawyer's."

The certain fee checks that were retained by Respondent were checks that either had Respondent or KCK listed as the payee [**Stipulation Para. 5**]. For *all* the retained checks that listed KCK as the payee, Respondent signed the back of the checks with his name *and* John Kilo's name, next to a pre-printed "return address" stamp of the name of KCK, which stamp was continuously available to all employees of KCK, stored by the receptionist desk at KCK [**Tr. I at 132, lines 18-25, at 133, lines 1-3, Tr. II at 185, lines 5-25, at 186, lines 1-21**]. It must also be observed that Respondent did not convert these

checks to cash, but rather deposited all of these checks that he retained into his checking account which he obviously knew would be information available should an issue of those deposits ever rise.

Respondent testified that when he was a lawyer at KCK, on many occasions it was required of him to sign John Kilo's name, with his knowledge and consent, on certain pleadings, letters, tax forms, etc. [**Tr. II at 187, lines 1-16**]. The signing by a person of the name of the payee followed by his own name as agent, even if without authority, indicated on the instrument itself that someone other than the payee had signed the payee's name to it. There is no common law forgery where an agent, in executing a document purportedly authorized by his principal, misrepresents the extent of his authority on the face of the instrument. Gilbert v. United States, 370 U.S. 650, 658, 82 S. Ct. 1399, 1404, 8 L.Ed. 2d 750, 756 (1962). See, also, Cunningham v. United States, 272 F. 2d 791, 793-794 (4th Cir. 1959), and Selvidge v. United States, 290 F.2d 894, 895 (10th Cir. 1961). The reason for the rule that false agency endorsements are not forgery is that the party who would be defrauded by such a false endorsement would not regard the endorsement as the act of the principal; instead, his reliance would be upon the existence of authority as evidenced by the representation of agency on the instrument. See United States v. Jones, 414 F. Supp 964, 970 (D.C. Md. 1976).

Even if its concluded that Respondent did not have the authority to sign John Kilo's name on the back of certain checks, Respondent still lacked the intent to defraud because the sole intent of depositing such checks into Respondent's checking account was to enforce the provisions of the fee-division arrangement. Evidence of such lack of

intent is supported by the testimony of Calvin Culp who stated that in all of the embezzlement or stealing, per se cases investigated by Criminal Investigation Division of the IRS, which Calvin Culp had knowledge or information about, never did any of those accused do what Respondent did, which was make no attempt to conceal receipt of the retained fees by depositing all of these fees (and for that matter, all of his receipts) into his checking account, and thereafter, including on his Schedule C of his 1995 and 1996 income tax returns a substantial portion of the retained fees that needed to be reported for income tax proposes (even though he did not receive any Form W-2 or Form 1099 for such funds) and also, completing and paying for both tax years 1995 and 1996, Schedule SE for self-employment taxes [**Tr. II at 114, lines 3-25, at 115, lines 1-2, at 116, lines 1-25, at 117, lines 1-12; see also Para. 5.E) of Informant's Exhibit "19", and Respondent's Exhibits "H" and "I"**].

Evidence of such lack of intent is also supported by the testimony of Jeffrey Jenson, the FBI agent assigned to the investigation of Respondent; and by Angela Carter who was employed at KCK from June 1992 through June 1998, to handle the legal fee bills and the payments on the legal fee bills at KCK.

Jeffrey Jenson verified that the client billing records to determine when fees collected from Respondent's cases or from "his" clients were either deposited into KCK's checking account or deposited into Respondent's checking account *were there at KCK the whole time* [**Tr. I at 44, lines 20-25, at 45, lines 1-12**].

Angela Carter (a paralegal currently employed at Greensfelder, Hemker & Gale--a large St. Louis downtown law firm) testified that while she was employed at KCK from

June 1992 through June 1998, there was "probably not" anybody more involved in handling the legal fee bills and the payments on the legal fee bills at KCK than her [**Tr. I at 342, lines 20-25, at 343, lines 1-2, at 345, lines 23-25, at 346, lines 1-5**]. Angela Carter testified: (i) that there was never a time that Respondent directed her to do anything insofar as billing or receipts that she considered improper or inappropriate [**Tr. I at 347, lines 15-21**]; (ii) that she does not ever recall Respondent hiding information from her or hiding checks from her [**Tr. I at 352, lines 19-21**]; (iii) that she does not ever recall Respondent every telling her to, "Don't tell the other lawyers about this," or, "Don't show them this," or, "Don't show them that," or, "Hide this", and that "I don't see him [Respondent] ever putting me in that position to ask me to do that." [**Tr. I at lines 23-25, at 353, lines 1-6**]; (iv) that all payments from legal fee statements of Respondent's cases that were delivered to "his" clients were posted in Respondent's client ledgers that were kept by KCK's billing clerk "on a shelf in the corner right up by the [KCK's] reception area" [**Tr. I at 357, lines 2-4, at 367, lines 13-25, at 368, lines 1-11**] and (v) that copies of all of Respondent's legal fee statements were kept by KCK's billing clerk "in boxes up underneath a table up by my desk" [**Tr. I at 369, lines 2-5**].

Informant stated in its Brief on pages 9 through 12 that: a) "Respondent stole at least $169,172.17 in fees properly payable to KCK and deposited most of those fees into his personal bank account"; b) "the sum of $50,806.21 in KCK client fees was misappropriated by Respondent and deposited into the account of the law firm that he joined immediately after leaving KCK"; and c) that Respondent "intentionally forged the signature of John Kilo" on the back of certain checks. Informant attempts to support such

unfounded allegations, along with certain other claims in such sections, by citing **Stipulation Paras. 5(a) and 5(b); Stipulation Exhibits 1 and 2.** These Stipulations were prepared by the parties to provide efficiency of time in *only* stipulating that certain checks on which the payee was either Respondent or KCK were deposited into either Respondent's checking account or his new law firm checking account after he left KCK. The efficiency of time was needed because of the limited amount of trial time assigned to this Hearing. These Stipulations make *no* stipulation that the "checks" were for legal fees, that the "checks" were stolen or misappropriated, or that Respondent forged certain "checks." Informant should especially know that **Stipulation Exhibits 1 and 2** do not make any stipulation that Respondent forged certain "checks." Counsel for Informant stated at the Hearing, "We did not have a stipulation that he forged a signature…." [**Tr. II at 94, lines 2-3**]. Informant's representation to this Court that the joint stipulations state something that they clearly do not is inappropriate.

The credible evidence as to what checks set forth on Stipulation Exhibits 1 and 2 were for fees for legal services rendered by Respondent from January 1994 through January 1997, including what fees were retained by Respondent pursuant to the agreement negotiated in mid January 1994 between him and John Kilo, are completely set forth in Culp's Report. Moreover, Culp's Report was for all intents and purposes validated by the IRS where upon the IRS' civil audit of Respondent concluded that the legal fees retained by Respondent for calendar year 1995 were approximately the same as determine by Calvin Culp as set forth in Culp's Report, and that the legal fees retained by

Respondent for calendar year 1996 were almost seven thousand dollars less than as determine by Calvin Culp as set forth in Culp's Report [**See Respondent's Exhibit "U"**].

In addition, Respondent did not misappropriate the sum of $50,806.21 or any amount in KCK client fees after leaving KCK in January 1997. After Respondent resigned again from KCK in January 1997, John Kilo individually negotiated with Respondent for an amount Respondent was to pay KCK for the then outstanding accounts receivable of Respondent's clients, in exchange of Respondent taking such receivables to his new law firm, along with the legal services rendered to his own clients in 1996, which had not yet been billed, and billing such legal services from Respondent's new law firm for Respondent's own benefit [**Tr. I at 128, lines 15-25, at 129, lines 1-25, at 130, line 1; see also Respondent's Exhibit's "BB" which set forth the disposition of clients that Respondent was taking with him, along with the billings associated with such clients, to his new law firm**].

Informant suggests in its Brief that Respondent lied to clients; yet offers only the testimony of Bruce Meyer to futilely attempt to support such suggestion. Nothing that Bruce Meyer testified to suggest that anything what Respondent said to him was proven a lie.

Bruce Meyer considered Respondent as his lawyer and was satisfied with Respondent's legal services [**Tr. I at 75, lines 17-19, at 87, lines 12-14**]. According to Bruce Meyer, Respondent told him that he owed a balance for attorney fees [**Tr. I at 77, lines 2-5**], which was true [**See Informant's Exhibit "5"**]. Also according to Bruce Meyer, Respondent ask him to make the check payable to Respondent for the attorney

fees [**Tr. I at 78, lines 5-8**], which was also true, but Bruce Meyer's response was incomplete. Respondent testified that in response to Bruce Meyer's question as to whom he should make as the payee on his check, Respondent replied either KCK or Respondent, what ever was easier for Bruce Meyer [**Tr. II at 272, lines 21-25, at 273, lines 1-8**]. Respondent's response was an acceptable custom and practice at KCK [**See testimony of John Kilo in Tr. I, at 102, lines 12-22**]. Finally, Bruce Meyer testified that he "expected to see a credit balance" after he wrote his check to Respondent [**Tr. I at 80, lines 23-25, at 81, line1**], which he did receive on subsequent bills[13] [**Tr. I at 82, lines 6-13**].

Informant also alleges in its Brief that Respondent embezzled legal fees by bartering with Richard LaRico; yet, the evidence completely refutes such allegation. First, there was a written signed lump-sum proposal for the remodeling work that Richard LaRico was to do for Respondent, and Respondent paid Richard LaRico the amount subsequently requested of him to pay [**Tr. I at 142, lines 8-10, at 150, lines 6-11 and 19-25, at 151, lines 1-25, at 152, lines 1-25, at 153, lines 1-8; see also Respondent's Exhibit "TT'**]. Secondly, Calvin Culp testified that in his professional opinion that he questioned whether it was a barter transaction because there was a written document and

[13] Angela Carter also testified: " I know there were several occasions where Bruce Meyer may have had three different files opened at the same time, and the payment was entered on the wrong case, so one of the other cases could have a credit of this amount because it was entered on the wrong one…." [**Tr. I at 359, lines 13-18**].

in typical barter transactions there are no documents—it's all word to word, and because, to his knowledge, the government never charged Richard LaRico for this transaction [**Tr. 119, lines 6-13**]. Thirdly, there was no bartered income included under the IRS' civil audit of Respondent for calendar years 1995 and 1996 [**See Respondent's Exhibit "U"**]. Finally, Informant attempted to support its position base on the testimony of Richard LaRico, who in fact testified on redirect that he lacked personal knowledge of this alleged barter arrangement: "To be honest with you, …I don't know" [**Tr. I at 154, lines 4-6**].

If it is concluded that Respondent's self-enforcement of the fee-division arrangement was equivalent to misappropriated fees from his own law firm, this Court and courts in other states have imposed a variety of sanctions in cases where an attorney intentionally or was claimed to misappropriated fees from his own law firm—ranging from no sanction to public reprimand to suspension. See e.g. In re Charron, *supra*; Matter of Cupples, 952 S.W.2d 226 (Mo. banc 1997) (lawyer suspended indefinitely with leave to apply for reinstatement no sooner than six months for, *inter alia*, concealing and failing to share fees with his firm); The Fla. Bar v. Ward, 599 So.2d 650, 651 (Fla. 1992) (the Court stated that there is a presumption that disbarment is the appropriate punishment for lawyers who intentionally steal client funds; however, the Court stated that it had not applied that presumption in cases where lawyers have stolen money outside a client context); and State ex rel. Nebraska State Bar Ass'n v. Frederiksen, 635 N.W.2d 427 (Neb.2001) (lawyer suspended for three years for misappropriating fees from his own law firm).

In State ex rel. Nebraska State Bar Ass'n v. Frederiksen, at 433-435, the Supreme Court of Nebraska provided a thorough discussion of discipline imposed in cases where an attorney misappropriated fees from his own law firm, as follows:

> "The discipline imposed has ranged from no sanction to public reprimand to suspension. As the Washington Supreme Court noted in a case which did not involve misappropriation of client funds, 'the need for discipline [in such cases] is less clear.' In re Rice, 99 Wash.2d 275, 277, 661 P.2d 591, 593 (1983). In In re Rice, the attorney did not properly record all payments made to him and retained some client funds for his own use. The court stated:
>
> > 'Because protection of the public and preservation of the public's confidence in the legal profession are the primary purposes of attorney discipline, the misappropriation of client funds usually warrants a severe sanction.... These interests are not served, however, in the resolution of internal problems of a law firm. Resolution of a dispute between members of a law firm is usually sought in a civil suit.... Accounting practices for client funds are strictly regulated by a specific provision in the Code of Professional Responsibility, but no such rule governs accounting procedures for law firm funds.' Id. at 277-78, 661 P.2d at 593.

The Iowa Supreme Court imposed a public reprimand on an attorney who failed to remit court-appointed attorney fees to his law partnership. See Com. on Pro. Ethics v. McClintock, 442 N.W.2d 607 (Iowa 1989). Over a 9-year period, the attorney had retained checks totaling $6,990.70, which he agreed belonged to the law partnership. The court stated:

> 'An attorney cannot resort to self-help to rectify what may be perceived to be an inequity in the division of law partnership earnings. Most law partnerships are founded upon a total trust and confidence among the partners. A breach of this exceedingly close relationship merits disciplinary action. Although McClintock's conduct did not involve an attorney-client relationship, his conduct is governed by the Code of Professional Responsibility.
>
> Although severe sanctions may be justified in cases involving attorneys' conduct with members of their law firms or partnerships, we agree with the commission's recommendation in this case. McClintock has no prior disciplinary record. He reported the violation and fully cooperated with the committee.' Id .at 608.

In a Minnesota case, an attorney was placed on 2 years' probation when he, over a 5-year period, retained approximately $6,300 in fees which belonged to his firm's partnership. See In re Holly, 417 N.W.2d 263 (Minn.1987).

A 30-day suspension was ordered for a Florida attorney who engaged in moonlighting by accepting cases without the knowledge or consent of the law firm with which he was associated. See The Florida Bar v. Cox, 655 So.2d 1122 (Fla.1995). The attorney requested that the clients' payments be made to him, and he kept the payments for his own personal use. He initially denied such conduct, but when evidence was presented, he admitted to having collected the fees. The attorney 'continued to engage in unauthorized legal employment even after he was specifically warned against it, and, even more importantly, willfully deceived the law firm about his conduct.' Id at 1123.

In Disciplinary Action Against Haugan, 486 N.W.2d 761 (Minn.1992) an attorney was found to have misappropriated law firm funds when he agreed to accept a portion of a client's settlement proceeds as payment in full for outstanding attorney fees. The agreement was made without the knowledge or consent of the law firm's shareholders. The attorney deposited into his personal checking account $25,000 in settlement proceeds and attempted to hide the payment by asking the law firm to 'write off' the client's outstanding attorney fees. The attorney did not disclose his misappropriation until the law firm sued him for allegedly converting law firm property. The Minnesota Supreme Court held that the attorney should be suspended from the practice of law for a period of 30 days.

A 30-day suspension was also entered in a case in which the attorney misappropriated law firm funds and opened client files in his own name in order to keep the files secret from the law firm. See Disciplinary Action Against Bremseth, 456 N.W.2d 246 (Minn.1990). The attorney asserted that his conduct was not misappropriation but arose out of 'a hostile and bitter financial dispute among the members of the law firm. Id. at 247. The 30-day suspension was stayed and ordered dismissed if the attorney abided by disciplinary rules for 1 year.

A 60-day suspension was imposed by the Wisconsin Supreme Court in Disciplinary Proceedings Against Casey, 174 Wis.2d 341, 496 N.W.2d 94 (1993). The attorney, on three separate occasions, appropriated client retainers to his own use rather than giving them to the law firm where he was employed. Two years later, the Wisconsin court suspended an attorney from the practice of law for 18 months for more severe misconduct, including misappropriating firm funds, manipulating the law firm's computer system to conceal his crime, denying any misappropriation when confronted by the law firm, refusing to make restitution, and failing to demonstrate remorse. See Disciplinary Proceedings Against Brunner, 195 Wis.2d 89, 535 N.W.2d 438 (1995).

The Florida Supreme Court found a referee's recommended 12-month suspension excessive and imposed a 90-day suspension in a case in which

an attorney accepted client funds and deposited less than the full amount of those funds in the law firm's accounts. See The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla.1986). The court found that although the attorney's actions demonstrated 'extremely poor judgment ... his actions [fell] short of a deliberate attempt to steal' from the law firm. Id. at 817.

An attorney who converted $80,000 of his firm's funds to his own use was placed on suspension for 3 years in a Louisiana case. See In re Kelly, 713 So.2d 458 (La.1998). The attorney asked clients to make checks payable to him and deposited them in his personal account. However, '[t]he firm was the sole victim of Mr. Kelly's appropriation.' Id. at 459. Although the court noted that '[t]he baseline sanction for conversion is disbarment,' it recognized several mitigating factors, including the attorney's lack of any prior disciplinary record, acknowledgment of the wrongful nature of the actions, cooperation in the disciplinary investigation, and payment of full restitution. Id. at 461. The attorney's actions did not harm any clients, and his partners testified in favor of a more lenient sanction."

Finally, courts in other jurisdictions dealing with similar issues have indicated that the fact that an attorney has a good faith argument of entitlement to the funds may serve as a mitigating factor. See Rogers v. Mississippi Bar, 731 So.2d 1158, 1172 (Miss.1999).

The Informant cited in its Brief the case of Kaplan v. State Bar of California, 804 P.2d 720 (Ca. banc 1991), as its authority why Respondent should be disbarred; but

unlike Respondent, Kaplan intentionally deceived his partners and a State Bar investigator as to why he misused the money. Kaplan also engaged in misappropriation to further an expensive life style. Id. at 721. The Court found "Kaplan's behavior indicative of a level of dishonesty that raises concerns beyond those associated with misappropriation of others' funds. Finally, we find Kaplan's lack of candor with the investigators from the State Bar particularly disturbing. Kaplan's behavior was grievously improper, and he continued that behavior for several months." Id. at 724.

The Informant also cited in its Brief the case of In re Pennington, 348 P.2d 720 (Or. Banc 1960), as additional authority why Respondent should be disbarred. In that case, Pennington had secreted partnership funds over an eight- year period into his own account; even though Pennington had a written partnership agreement with another lawyer for an even division of partnership proceeds. In addition, Pennington did not report any of such secreted partnership funds to the taxing authorities; but instead caused false and fraudulent partnership income tax returns to be filed. The deceit was discovered when the Pennington's partner had reason to suspect the withholding. When confronted, Pennington admitted his deceit. Id. at 775.

In the case at bar, there was no evidence that Respondent intentionally deceived his partners, engaged in misappropriation to further an expensive life style[14] or had any

[14] The Informant stated in its Brief on page 9 that in spite of earnings increase and additional personal loans, Respondent's financial condition worsened; however, there

lack of candor with the investigators in this case. Jeffrey Jenson, the FBI agent involved in the investigation of Respondent, testified that at the initial interview of Respondent in September 1998, Respondent was responsive to his questions [**Tr. I at 28, lines 10-12**]; that Respondent stated at the start of the interview that he was entitled to thirty percent (30%) of the fees collected from his own clients pursuant to an agreement negotiated in mid January 1994 between him and John Kilo [**Tr. I at 33, lines 12-24**]; and that Respondent had a "justification" to his retaining of checks for legal fees [**Tr. I at 28, lines 13-25, at 29, lines 1-3**]. Informant states that during Jeffrey Jenson's initial interview of Respondent, Respondent admitted "the scheme" and admitted he "took client funds." See page 15 of Informant's Brief. Respondent did not make any such admissions, because there was no scheme, and there were no client funds involved. Informant's representation to this Court that Jeffrey Jenson's interview notes of Respondent state something that they clearly do not is inappropriate.

Thus, Respondent respectfully submits to this Court that even though the self-enforcement of the fee-division arrangement was wrong, Respondent has convincible and credible evidence to support his good faith argument of entitlement to the legal fees he retained that supports his request that this Court deem a suspension, rather than disbarment, of his law license appropriate to protect the public interests.

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was no evidence whatsoever adduced that indicated that such occurred in order to suggest a motive to support Informant's allegations of stealing or embezzlement.

ARGUMENT II.

RESPONDENT'S VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 7206(1) DOES NOT ASCEND TO THAT LEVEL OF MORAL TURPITUDE THAT MANDATES DISBARMENT.

As stated in earlier in this Brief, the community expects lawyers to exhibit the highest standards of honesty and integrity and they have a duty not to engage in conduct involving the commission of a crime, dishonesty, or fraud. In his duty to the legal profession, Respondent was required to do his part to maintain the integrity of the profession. Respondent, however, regrets that he has violated Rule 4-8.4 (b) and (c) of the Missouri Rules of Professional Conduct Rule by his violation of Section 7206(1), which reflects adversely on his honesty in the handling of his 1996 personal income taxes.

Respondent further states that because of his violation of Section 7206(1), he should be disciplined by this Court; but respectfully requests that the discipline be a suspension of his license, not disbarment. Respondent believes that the following provides exculpatory explanations that substantiate the reasonable proposition that his violation of Section 7206(1) does not ascend to a level of moral turpitude that mandates disbarment.

The U.S. Supreme Court referred to the crime under Section 7206(1) as "falsifying tax returns," and approved of the trial court instruction that the defendants were not guilty of violating Section 7206(1) "unless they had signed the tax returns knowing them to be

false," and had done so willfully. United States vs. Pomponio, 429 U.S. 10, 11, 97 S. Ct. 22, 23, 50 L.Ed. 2nd 12 (1976). The approved instruction included finding that the taxpayers made the return " 'with the specific intent and knowledge at the time they made it that it was in fact a false return.' " Id., n.2. For purposes of Section 7201-7207, "willfully" requires "more than a showing of careless regard for the truth" and "means a voluntary, intentional violation of a known legal duty." Id., 429 U.S. at 12. This definition says nothing about fraud (i.e., intent to evade taxes) being an element of the offense; it requires nothing more than a specific intention to violate the law. Id., 429 U.S. at 11-13.[15] The element of known falsehood in a return verified under the penalties of perjury, which is required by Section 7206(1), distinguishes it from the willful failure to file offense as to moral turpitude[16].

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[15] See also e.g., Siravo v. United States, 377 F. 2d. 469, 472 n.4 (1st. Cir. 1967); United States v. Tsanas, 572 F. 2d 340, 343 (2d Cir. 1978); United States v. Beasley, 519 F. 2d 233, 245 (5th Cir. 1975); and United States v. Whyte, 699 F. 2d. 375, 381 (7th Cir. 1983).

[16] The Revenue Act of 1942 removed the requirement that individual income tax returns be made under oath. Only verification under the penalty of perjury was required under Section 145(c) of the Internal Revenue Code of 1939. The purpose of Section 145(c), which is virtually identical to Section 7206(1), was "to impose the penalties for perjury upon those who willfully falsify their returns regardless of the tax consequences of the falsehood." Gaunt v. United States, 184 F.2d 284, 288 (1st Cir. 1950), cert. denied, 340

A lawyer's conviction of violating federal income tax laws may involve moral turpitude warranting disciplinary action. In re MacLeod, 479 S.W.2nd 443 (Mo. banc 1972), cert. denied 409 US 979, 93 S. Ct. 312, 34 L. Ed. 2d 243. This Court has long defined moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general." In re Frick, 694 S.W.2nd 473, 479 (Mo. banc 1985). In a criminal action under Section 7206(1), the issue actually litigated and necessarily determined is whether the taxpayer voluntarily and intentionally violated his or her known legal duty not to make a false statement as to any material matter on a return. United States vs. Pomponio, supra at 12; see also United States vs. Bishop, 412 U.S. 346, 360, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1973). As noted above, the intent to evade taxes is not an element of the crime charged under Section

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U.S. 917, 71 S.Ct. 350, 95 L.Ed. 662 (1951). In 1949, Section 145(c) was repealed and a new Section 3809(a), was enacted. In 1954, Section 3809(a) was replaced by the present day Section 7206(1). The only difference among Sections 145(c), 3809(a) and 7206(1) is in the severity of the penalty. The courts still attribute the same purpose to Section 7206(1). See, e.g., United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975) (The primary purpose of Section 7206(1) is to impose the penalties of perjury upon those who willfully falsify their returns.); See also Hoover v. United States, 358 F.2d 87 (5th Cir. 1966), cert. denied, 385 U.S. 822, 87 S.Ct. 50, 17 L.Ed.2d 59 (1966) (Section 7206(1) is similar in nature to a perjury prosecution which makes the fundamental issue of the offense false swearing as to a material matter).

7206(1). Thus, the crime is complete with the knowing, material falsification, and a conviction under Section 7206(1) does not establish as a matter of law that the taxpayer violated the legal duty with intent, or in an attempt, to evade taxes.

In light of the foregoing legal analysis, a conviction under Section 7206(1) does not have present the element of fraud and thus does not always entail a crime involving moral turpitude. Interesting, Assistant U.S. Attorney Reap testified that after the sentencing of Respondent, he learned that Respondent's plea of guilty to Count IX of the Indictment was *not* considered a "Crime of moral turpitude" [**Tr. I at 305, lines 22-23**].

Consideration of the nature of the underreporting of receipts, for determining a lesser degree of culpability, does not constitute a retrial of the issue of guilt in violation of the rule that the certification of conviction is conclusive evidence of guilt. The offense to which Respondent plead guilty does not require criminal intent, and the evidence of lack of criminal intent truly goes to the degree of culpability rather than to the guilt of the charged offense. Thus, the element of intent, which is an essential element of the more severe crime of tax evasion, is missing in Respondent's case, which may have been the reason the government pursued the less serious tax offense under Section 7206(1).

Therefore, disbarment should not be an inevitable conclusion when this Court is faced with disciplining a lawyer convicted of a violating a federal income tax law, especially if there is an adequate exculpatory explanation. In re McLeendon, 337 S.W.2nd 56 (Mo. banc 1960); In re Burrus, 258 S.W.2nd 625, 364 MO 22 (Mo. banc 1953). Each case involving a disbarment proceeding must necessarily stand upon its own facts. In re Downs, 363 S.W.2nd 679, 690 (Mo. banc 1963). To disbar a lawyer, it must

be “clear” that the lawyer is not fit to continue in the profession; “disbarment is reserved only for clear cases of severe misconduct.” In re Mirabile and In re Moroney, 975 S.W.2nd 936, 939 (Mo. banc 1998), (citing In re Forge, 747 S.W.2nd 141, 145 (Mo. banc 1988)).

Thus, Respondent respectfully submits that there are exculpatory explanations that substantiate the reasonable proposition that Respondent’s violation of Section 7206(1) does not ascend to a level of moral turpitude that supports his request that this Court deem a suspension, rather than disbarment, of his law license appropriate to protect the public interests.

ARGUMENT III.

RESPONDENT STRICTLY ADHERED TO THE ADVICE AND COUNSEL OF HIS ATTORNEYS REPRESENTING HIM IN CONNECTION WITH HIS LAW LICENSE DISCIPLINARY MATTERS.

The Plea Agreement stated that Respondent would "surrender" his license to practice law; but there was some concern among the parties involved as to the meaning of "surrender." Respondent denies he committed any ethical misconduct with respect to his plea agreement about "voluntarily surrender[ing] his law licenses." It is simply unconverted that a misconception developed due to the lack of specific knowledge by all parties to the Plea Agreement regarding the rules governing the suspension/disbarment of attorneys. Even the Master observed during the Hearing that there was no meeting of the minds on the "surrender" issue [**Tr. II at 223, lines 12-25**].

Respondent never knowingly made any misrepresentation or omission in connection with these disciplinary proceedings. To the contrary, Respondent strictly adhered to the advice and counsel of David V. Capes and of Maurice B. Graham, his attorneys in connection with his criminal case and these disciplinary proceedings. Respondent understood that Assistant U.S. Attorney Reap was not opposed to a suspension of Respondent's license. The discussions between David Capes and Assistant U.S. Attorney Reap relating to the plea agreement were that Respondent's surrender of his law license would be handled in such a manner as would permit Respondent to apply for reinstatement of his law license at an appropriate time in the future upon a proper

showing that would establish to this Court his fitness for being reinstated to practice. Neither David Capes nor Assistant U.S. Attorney Reap anticipated or intended that Respondent would be unable for a period of five years be eligible to apply for readmission or that he would only be eligible for readmission if he applied for, was allowed to take and successfully pass the Missouri Bar Exam [**See letter from David Capes, Respondent's Exhibit "C" which was attached to Respondent's Response to Order to Show Cause filed with this Court on October 30, 2000; Stipulation Para. 15**].

Assistant U.S. Attorney Reap testified that his discussion with David Capes, Respondent's lawyer in the federal criminal case, about the effect of a "surrender" was whether "it would be a disbarment or a suspension was a question [and] something for the Missouri Supreme Court and the Office of Disciplinary Committee" [**Tr. I at 305, lines 11-19**]. Furthermore, Assistant U.S. Attorney Reap agreed that Respondent's plea of guilty to Count IX of the Indictment was "not as an admission for any civil actions or licensing issues" (emphasis added) [**See page 4 of the Plea Agreement; Stipulation Exhibit "4"**].

Even Informant's letter to Respondent dated June 23, 2000 [**Stipulation Exhibit "15"**] in response to Respondent's inquires of the procedure of "surrendering" his law license was unclear to Respondent as to the effect of a surrender because Informant first stated that likely an entry of disbarment would occur, but then in the same paragraph made reference to applying for "reinstatement". A "readmission" is entirely different

from a "reinstatement." A reinstatement contemplates having been suspended. Disbarment contemplates readmission after a bar exam.

Therefore, because of such uncertainty among the parties involved as to the meaning of "surrender," in late July 2000, Respondent retained Maurice Graham, as his attorney in connection with his law license disciplinary proceedings.

Between July 15, 2000 and August 4, 2000, Respondent proceeded in winding down his law practice; Respondent specifically notified his clients to make arrangements for other representation in preparation of his voluntarily ceasing of practicing law pending the findings of this Court regarding the appropriate form of discipline. As of August 4, 2000, the day of his sentencing, Respondent had voluntarily and immediately ceased practicing law [**Tr. II at 237, lines 20-25, at 238, lines 1-4; see also Master Exhibit "2"**].

Both before and after August 4, 2000, the day Respondent was sentenced, Maurice Graham was working with Informant on the issues involved in the actual "surrender" of Respondent's physical law license. On October 2, 2000, Respondent's law license was physically deposited with the Supreme Court of Missouri. Moreover, on February 28, 2001 the Supreme Court of Missouri denied Respondent's Application for Voluntary Surrender of License Pursuant to Rule 5.25 of the Missouri Rules of Professional Conduct.

In light of the forgoing, Respondent denies he has violated Rules 4-3.3, 4-8.1 and 4-8.4(d) of the Missouri Rules of Professional Conduct with respect to his Plea Agreement about "voluntarily surrender[ing] his law licenses." Respondent further

denies that his conduct with respect to his Plea Agreement about surrendering his law license violated Rule 4-8.4(c) of the Missouri Rules of Professional Conduct because he never knowingly made any misrepresentation or omission in connection with these disciplinary proceedings. To the contrary, throughout the process in connection with his law license disciplinary proceedings, Respondent strictly adhered to the advice and counsel of his attorneys representing him in connection with his federal criminal case and in connection with his law license disciplinary proceedings.

ARGUMENT IV.

THERE ARE OTHER COMPELLING MITIGATING REASONS THAT RESPONDENT RESPECTFULLY REQUESTS THIS COURT TO CONSIDER IN CONCLUDING THAT A SUSPENSION WOULD BE ADEQUATE TO PROTECT THE PUBLIC INTEREST PARTICULARLY BECAUSE OF RESPONDENT'S FAVORABLE CHARACTER AND EXCELLENT REPUTATION FOR INTEGRITY, HONESTY, LOYALTY, COMPETENCY, AND DEDICATION TO HIS WIFE AND CHILDREN, CHURCH, LEGAL PROFESSION, AND COMMUNITY THROUGHOUT HIS SEVENTEEN-YEAR CAREER AS A LAWYER.

There are other compelling mitigating reasons that Respondent respectfully requests this Court to consider in concluding that he is not an unsuitable practitioner and that this disciplinary proceeding is not a clear case of severe professional misconduct on the part of Respondent. Such other mitigating reasons include the lack of any evidence or contention that Respondent:

a. Caused any harm to his clients;

b. Poses any threat to his clients or the public at large;

c. Has ever betrayed the trust or confidence of any client;

d. Has ever failed to represent any of his clients in a proper and professional manner;

e. Has ever jeopardized the representation of his clients before any court or anybody;

f. Has ever demonstrated a flagrant or cavalier disregard for the law; or

g. Has ever before received a complaint or been the subject of a disciplinary proceeding.

In fact, *all* of the clients that testified in this hearing before the Master, including the two clients presented by Informant, and Informant's witness who is still a lawyer at KCK-Robert Trame-testified in one way or another that:

a) Respondent provided competent representation to his clients in compliance with Rule 4-1.1 of the Missouri Rules of Professional Conduct;

b) Respondent abided by his clients' decisions concerning the objectives of representation and consulted with his clients as to the means by which they are to be pursued in compliance with Rule 4-1.2 of the Missouri Rules of Professional Conduct;

c) Respondent acted with reasonable diligence and promptness in representing his clients in compliance with Rule 4-1.3 of the Missouri Rules of Professional Conduct;

d) Respondent kept his clients reasonably informed about the status of matters and promptly complied with reasonable requests for information in order for his clients to make informed decisions regarding the representation in compliance with Rule 4-1.4 of the Missouri Rules of Professional Conduct;

e) Respondent's legal fees were reasonable in compliance with Rule 4-1.5 of the Missouri Rules of Professional Conduct;

f) Respondent did not reveal confidential information regarding his clients in compliance with Rule 4-1.6 of the Missouri Rules of Professional Conduct; and

g) Respondent did not engage in conflict of interest matters adverse to his clients in compliance with Rules 4-1.7 thru 4-1.9 of the Missouri Rules of Professional Conduct.[17]

In addition, Jeffrey Jenson, the FBI agent involved in the investigation of Respondent, testified that that he talked to most, if not all, of Respondent's clients [**Tr. I at 47, lines 23-25, at 48, line 1**], and that all of such clients thought Respondent was a good, diligent lawyer that did not engaged in any type of a conflict of interest in the representation of them [**Tr. I at 52, lines 13-25, at 53, lines 1-2**].

[17] See Bruce Meyer's Testimony in **Tr. I at 86, lines 6-25, at 87, lines 1-14**; Richard LaRico's testimony in **Tr. I at 154, lines 15-25, at 155, lines 1-5**; Robert Trame's testimony in **Tr. I at 262, lines 1-25, at 263, line 1**; Douglas Voss' testimony in **Tr. I at 308, lines 13-25, at 309, lines 1-25, at 310, lines 1-4**; Nick Karakas' testimony in **Tr. I at 321, lines 24-25, at 322, lines 1-25, at 323, 1-4**; Anthony Karakas' testimony in **Tr. I at 326, lines 17-25, at 327, lines 1-17**; Barbara Ludwig's testimony in **Tr. I at 330, lines 15-21, at 331, line 25, at 332, lines 1-14**; Peter Katsinas' testimony in **Tr. I at 337, lines 10-18.**

Furthermore, there was no evidence whatsoever that suggest that the Respondent did anything other than holding property of clients that was in his possession in connection with a representation separate from Respondent's own property in compliance with Rule 4-1.15 of the Missouri Rules of Professional Conduct.

Even since the conclusion of the federal criminal case against Respondent, Respondent has conscientiously held himself in commendable manner. Lawrence Newberry, Senior Vice President of Respondent's employer's bank, who did not know Respondent before January 2001, testified that Respondent, who is in a "very responsible position", has done nothing over the last ten months in his dealings with the bank that has in any way shaken or diminished his confidence in Respondent [**Tr. II at 28, lines 13-25, at 29 lines 1-4**]. Lawrence Newberry also testified that he has been impressed "multiple times" in regard to Respondent's ability as a businessman [**Tr. II at 26, lines 18-25, and at 27, line 1**], that his interaction with Respondent over the last ten months has been "very consistent" with those other individuals the bank has trusted [**Tr. II at 27, lines 6-12**], and that his due diligence for loan purposes which includes to make sure that the management is trustworthy has been justified in Respondent [**Tr. II at 25, lines 24-25, at 26 lines 1-18, at 41, lines 18-25, at 42, lines1-7**].

Respondent respectfully request to this Court that it consider Respondent's conduct an aberrational lapse in good judgment and ethical behavior in a legal career with an otherwise unblemished disciplinary record. In further support of this Brief, Respondent hereby presents several affidavits and numerous other written testimonials [**See Respondent's Exhibits "B", "G","H","J", and "L" to Response of Respondent**

to Order to Show Cause filed October 30, 2000; see Stipulation Para. 15] to this Court from former law partners and other lawyers, clients, businessmen and other professionals, clergy, relatives, friends and acquaintances who have bare witness as to Respondent's favorable character and excellent reputation for integrity, honesty, loyalty, competency, and dedication to his family, church, legal profession, and community.

Respondent states that he has extreme remorse for his acts that led to his plea of violating Section 7206(1) and that he has publicly expressed remorse to his wife and children, friends, supporters, and the legal community at his August 4, 2000 sentencing. Respondent, a long-time active member and pro bono legal counsel to St. Nicholas Greek Orthodox Church, also acknowledges that he has failed his Church and his God. Such breach of professional misconduct exposed Respondent to public humiliation, anguish, and sacrifice. Such breach of professional misconduct also caused Respondent to relinquish his law practice and many of his civil rights.

With respect Respondent's remorse for the events regarding this disciplinary matter, and how these events have effected Respondent personally, professionally, and what effect did this have on his family, Respondent testified:

> " I didn't turn to self-pity, and I didn't turn to vengeance -- I took it as a lesson to become more mature and complete, and accept the responsibility of my, in essence, stupidity of the way I handled my tax matters…I accept responsibility on the way I handled my tax returns. I accept responsibility on the poor judgment in enforcing my arrangement that I had with John Kilo, and I accept responsibility for all the -- the pain

and suffering I caused my wife and children, the anxiety and uncertainty that I caused my clients, the public humiliation that I thrust upon the people that supported me throughout my life and my career. It's been-- it's been a lot of anguish and humiliation. I mean, I have dismantled my law practice. I have lost my civil rights, which were very important to me. You know, my reputation is severely damaged. My family suffered an enormous amount of emotional, financial toll….It's been a very difficult process, but, you know, my faith and my family has pulled us through…When I stood in front of Judge Hamilton I acknowledged my responsibility of what I did wrong with the tax return….When I'm sitting here today in front of you, Your Honor, what I did with respect to my self-enforcement was totally wrong, and I admit in my pleading and I admit today that it was against the professional rules of conduct for an attorney practicing in the State of Missouri."

[**Tr. II at 238, lines 5-25, at 239, lines 1-25, at 240, lines 1-9, at 285, lines 23-25, at 286, lines 6-11**].

CONCLUSION

WHEREFORE, Respondent Dan J. Kazanas respectfully request this Honorable Court to determine that a suspension of Respondent's license to practice law in the State of Missouri is adequate to protect the public interest particularly because of his favorable character and excellent reputation for integrity, honesty, loyalty, competency, and dedication to his wife and children, church, legal profession, and community throughout his seventeen-year career as a lawyer. Respondent further respectfully request that the suspension be effective October 16, 2000—the date this Court suspended Respondent from the practice of law in this state. Finally, Respondent respectfully submits to this Court that a suspension would be fully under the control of this Court, as would any future decision to terminate the suspension.

Dated: August 12, 2002.

Respectively submitted,

GRAY, RITTER & GRAHAM, P.C.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing were served by mailing said copies thereof by U.S. Mail, postage prepaid, on this 12th of August 2002, to: Alan D. Pratzel, Esq., Special Representative of the Office of Chief Disciplinary Counsel, 222 South Central, Suite 500, St. Louis, MO 63105; and Maridee Edwards, Esq., Chief Disciplinary Counsel, 335 American Avenue, Jefferson City, Missouri 65109.

_____

Maurice B. Graham

CERTIFICATION: RULE 84.06 (c)

I certify to the best of my knowledge, information, and belief, that this Brief:

a. Include the information required by Rule 55.03;

b. Complies with the limitations contained in Rule 84.06(b);

c. Contains 20,341 words, according to Microsoft Word 2000, which is the word processing system used to prepare this Brief; and

d. That *VirusScan* 4.0.3 software was used to scan the disk for viruses and that it is virus free.

_____

Maurice B. Graham